E. WALTER SUTTON, et al.,

Grievants,

v. Docket No. 99-21-262

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

E. Walter Sutton, Carl E. Bee, Carolyn Skinner, and R. Allen Fisher (Grievants), Custodians employed by Respondent Lewis County Board of Education (LCBE), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that their 250 day employment contracts were eliminated without proper consideration of their seniority.

These grievances were denied at Level I, on April 2, 1999, by Principals John M. Porterfield and Marcella Linger. These grievances were consolidated and advanced to Level II where an evidentiary hearing was conducted on May 26, 1999. Grievants were represented at this hearing by John Roush, Esq., of the West Virginia School Service Personnel Association, and LCBE was represented by Sophie E. Zdatny, Esq. The consolidated grievance was denied at Level II by Supervisor Edward Bennett on or about June 14, 1999, and advanced to Level III, where participation was waived pursuant to

W. Va. Code §18-29-4(c). The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels. The parties were given until October 12, 1999, to submit proposed findings of fact and conclusions of law, (See footnote 1) and thisgrievance became mature for decision on that date. The facts in this matter are undisputed. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants are Custodians employed by LCBE and formerly assigned to either Weston Central or Peterson Elementary schools. Grievants held 250 day employment contracts during the 1998 - 1999 school year.

2. LCBE closed Weston Central and Peterson Elementary schools at the end of the 1998 - 1999 school year, and opened a new school, Wagoner Elementary.

3. LCBE decided to terminate Grievants at the end of the 1998 - 1999 school year, and rehire

them with 200 day employment contracts, at Wagoner Elementary, for the 1999 - 2000 school year.

4. LCBE retained several Custodians, with 250 day employment contracts, who had less seniority than Grievants.

5. On or about April 1, 1999, Grievants initiated their grievances at Level I. (See footnote 2)

6. By letters dated April 1 and 2, 1999, Principals John M. Porterfield andMarcella Linger denied the grievances at Level I. The letters denying the grievances did not contain a Level II appeal form, did not indicate to whom a Level II appeal should be addressed, or state how long Grievants had to file their Level II appeals.

7. On or about April 22, 1999, Grievants' representative Thelma Davisson learned from Grievants that their grievances had been denied at Level I. On April 23, 1999, she filed a Level II appeal on behalf of Grievants Sutton, Bee, and Fisher. (See footnote 3)

DISCUSSION

Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991).

LCBE has raised a timeliness defense. W. Va. Code § 18-29-4(b) requires that Grievants file their appeal to Level II within five days of receiving their Level I decision. “Days” is defined as “days. . . exclusive of Saturday, Sunday, official holidays or school closings[.]” W. Va. Code § 18-29-2. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 17, 1997); Lowry v. W. Va. Dept. of Educ.,Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

The testimony regarding the filing date of this grievance was uncontested. Grievants' grievances were denied at Level I by letters dated April 1 and 2, 1999, and they filed a Level II appeal on April 23, 1999. However, the letters informing Grievants that their grievances were denied at Level I failed

to properly inform them of their appeal rights.

W. Va. Code § 18-29-3(i) requires that "the decision shall include the name of the individual at the next level to whom appeal may be made." LCBE's Level I decisions plainly did not.

When a decision fails to include instructions on where an appeal may be filed, and absent evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq. is entitled to the requested hearing. Duruttya v. Mingo County Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989) (delay of approximately two months in filing Level IV appeal).

Further, W. Va. Code § 18-29-3(i) requires that "[f]orms for. . . . taking appeals . . . . shall be made available by the immediate supervisor to any employee upon request[,]" and it appears that forms for an appeal to Level II were not available from Grievants' immediate supervisors. (See footnote 4) Accordingly, LCBE has failed to establish its timeliness defense by a preponderance of the evidence. With regard to the substance of this grievance, Grievants are correct that their 250 day employment contracts were eliminated without proper consideration of their seniority. As a cost-cutting measure, LCBE decided to stop hiring Custodians to 250 day contracts, in effect reducing the number of such contracts to zero through attrition. (See footnote 5) Accordingly, Grievants' 250 day contracts were terminated at the end of the 1998 - 1999 school year, and they were offered 200 day contracts for the 1999 - 2000 school year.

If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code § 18A-4-8b. If a board of education decides to reduce the employment terms for particular jobs, the board must first terminate the existing contracts by following the procedures of W. Va. Code § 18A-2-6, and second fill the job vacancies by following the procedures and requirements of W. Va. Code § 18A-4-8b. In either case, a board of education must "make decisions affecting promotion and filling of any service personnel positions of employment or jobs. . . . on the basis of seniority, qualifications and evaluation of past service." W. Va. Code § 18A-4-8b. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487, (1994).

"[W]here the number of employees within a particular job classification is reduced the employee with the least amount of seniority within that classification is to be released." Berry v. Kanawha County Bd. of Educ., 191 W. Va 422, 446 S.E.2d, (1994). ThisGrievance Board has held that Berry

requires that length of employment contracts be considered when implementing a reduction in force. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994).

Grievants established that LCBE continued to employ several less senior custodians under 250 day employment contracts, after reducing Grievants to 200 day contracts. Accordingly, Grievants have met their burden of proof. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. When the number of employees within a particular job classification is to be reduced, the employee with the least amount of seniority within that classification is to be released. W. Va. Code § 18A-4-8b; Berry v. Kanawha County Bd. of Educ., 191 W. Va 422, 446 S.E.2d, (1994).

3. The length of employment contracts must be considered when implementing a reduction in force. Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994).

4. Grievants proved that their 250 day employment contracts were eliminated without proper consideration of their seniority.

Accordingly, this grievance is **GRANTED,** and Respondent Lewis County Board ofEducation is **ORDERED** to reinstate Grievants' 250 day employment contracts, with all back pay, interest, and benefits, less set-off, to which they would have been entitled had Respondent not terminated those contracts.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the

appropriate circuit court.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated November 2, 1999

Footnote: 1

This grievance was transferred, for administrative purposes, to the undersigned administrative law judge, on October 5, 1999.

Footnote: 2 *Respondent maintained at Level II, in its proposed findings of fact and conclusions of law, that Grievant Skinner's grievance was untimely, arguing that she failed to file a Level I grievance form within ten days of her informal conference with her immediate supervisor as required by W. Va. Code § 18-29-4(a)(3). However, because Grievant Skinner clearly initiated the grievance process with her informal conference; because the letter from Marcella Linger, referred to in Finding of Fact Six, constitutes a denial of her grievance at Level I; because her grievance had clearly been consolidated with the others at some point prior to the Level II hearing, and because the grievance process is intended to provide "a simple, expeditious and fair process for resolving problems. . .," W. Va. Code §18-29-1, her grievance will be considered timely filed.*

Footnote: 3 *The record appears to indicate that Grievant Skinner did not sign the Level II appeal until the next business day, April 26, 1999.*

Footnote: 4 *Respondent concedes that its failure to make these forms available establishes an excuse for Grievants' failure to file their Level II appeal in a timely manner.*

Footnote: 5 *It is noted that this rationale fails to explain why LCBE continued to hire other Custodians to 250 day contracts.*