DEBRA PENDLETON, et al.,

Grievants,

v. **Docket No. 01-41-401**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Debra Pendleton, a probationary employee, filed this grievance against her employer, the Raleigh County Board of Education ("RBOE"), when her probationary contract was not renewed, and she received no written notice that the superintendent would recommend that her contract not be renewed and that she could request a hearing. The other Grievants, Esther Akers, Tina Bishop, Marilyn Burgess, Kelly Burnett, Beverley Castanon, Joyce Carnes, Cynthia Cassidy, Wilma Cox, Pamela Daniel, Vickie Darnell, Jewell Falk, Cynthia Hungate, Deborah King, Tammy Lynch, Joey McDaniels, Deborah Poe, Audrey Saddler, Elsie Rupe, Christy Turner, Marcella Ryder, and Leona Moye, filed their grievance after Grievant Pendleton filed hers, based upon the theory that if Grievant Pendleton prevailed, they should not be reduced-in-force because they were more senior than Grievant Pendleton. The statement of grievance filed at Level IV reads:

> Grievants are regularly employed in the secretarial classification. They contend that the Respondent failed to properly notify Grievant Debra Pendleton of the recommendation for her reduction-in-force in violation of West Virginia Code § 18A-2-6. Further, she was not accorded the same due process as other employees which resulted in discrimination and favoritism in violation of West Virginia Code § 18-29-2. Grievants contend that Ms. Pendleton's termination was invalid and that, as a consequence, all the personnel actions involving the other grievants (complete reduction-in-force, reduction in employment terms, and transfer) were also invalidated pursuant to West Virginia Code §§ 18A-4-8b and 18A-4-8g.

Grievants requested as relief:

> (a) nullification of the personnel actions approved by Respondent in each of their cases in the spring of 2001; (b) compensation for any and all wages or benefits lost as a result of Respondent's actions; (c) interest on any sums to which they are entitled;

(d) credit for any seniority lost. (See footnote 1)

There is no question that as a probationary employee, Grievant Pendleton had only limited statutory rights. The law is clear that she was not entitled to notice that her contract would not be renewed. The fact that other probationary employees received such notice in writing while she did not does not constitute discrimination or favoritism in this case, as RBOE treated her in the same manner it treated all other probationary employees. It mailed her written notice by certified mail, just as it did other probationary employees. The postal service lost Grievant Pendleton's written notice. As Grievant Pendleton has not demonstrated she is entitled to relief, the grievances of the other employees need not be addressed.

The following Findings of Fact are properly made from the evidence introduced at Levels II and IV.

FINDINGS OF FACT

1. During the 2000-2001 school year, Grievant Pendleton was employed by RBOE as a full-time Secretary II at Central Elementary School, under a probationarycontract of employment. Prior to the 2000-2001 school year, Grievant Pendleton was employed by RBOE as a substitute, having begun her employment with RBOE in January 1999. Her seniority date is February 7, 2000. She was near the bottom of the seniority list, and she was aware of her position on the seniority list.

2. On March 12, 2001, RBOE Superintendent Charlotte Hutchens and Dr. Emily Meadows, RBOE's Personnel Director, visited Central Elementary School. They met with Grievant Pendleton and told her she would not be retained in her position due to the need to reduce personnel and her position on the seniority list. Central Elementary School Principal Ann Coleman had previously told Grievant Pendleton that her employment would be terminated at the end of the school year due to a reduction in force.

3. By letter dated March 6, 2001, Superintendent Hutchens attempted to notify Grievant Pendleton that she would be recommending her termination, due to Grievant Pendleton's position on the seniority list. The letter was sent to Grievant Pendleton by certified mail, return receipt requested, on March 6, 2001. Dr. Meadows delivered the letter to the main post office at Beckley. The letter was lost by the postal service, and was not delivered to Grievant Pendleton.

4. During March 2001, Grievant Pendleton told Principal Coleman she had not received a letter notifying her that she would not be employed the following year. Principal Coleman telephoned Dr. Meadows and relayed this information. Dr. Meadows told Principal Coleman the letter had been sent, and Grievant Pendleton just had not picked it up at the post office. Principal Coleman did not inform Dr. Meadows that her assumption was incorrect, and that Grievant Pendleton had not received notice that she had a certified letter at the post office, nor did she relay her conversation with Dr. Meadows to Grievant Pendleton.

5. Grievant Pendleton did not request a hearing before RBOE at any time. 6. Approximately 50 RBOE service personnel were affected by the need to reduce personnel as a result of decreased funding for service personnel positions, including other secretaries who had more seniority than Grievant Pendleton.

7. On March 30, 2001, Grievant Pendleton received notification that a certified letter was at the post office for her. On April 2, 2001, Grievant Pendleton went to the post office and picked up the letter. The letter was from Superintendent Hutchens dated March 28, 2001, and notified her that RBOE had accepted the superintendent's recommendation on March 27, 2001, that Grievant Pendleton's contract be terminated, and that she would be placed on preferred recall.

DISCUSSION

Grievants bear the burden of proving the elements of their grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Grievant Pendleton acknowledged her limited statutory rights, but argued she was entitled to the same notice and opportunity to request a hearing as other probationary employees because RBOE had chosen to give employees this right, and that the failure to provide her these same rights constitutes discrimination and favoritism.

As a probationary employee, Grievant Pendleton was not entitled to advance notice that her contract would not be recommended for renewal. By statute, she only has to be notified that the board of education has not renewed her contract, and it is then that she may request a hearing. The fact that RBOE gave her oral notice of the superintendent's recommendation, and attempted written notification, does not change the statutory procedure. Miller v. Bd. of Educ. of Boone County, 190 W. Va. 153, 437 S.E.2d 591 (1993); Harmon v. Pocahontas County Bd. of Educ., Docket No. 00-38-201

(Oct. 18, 2000). Her contract was not terminated. A probationary contract expires by its own terms. RBOE simply declined to renew her contract in the spring of 2001. RBOE was only required to follow the procedures set forth in W. Va. Code § 18A-2-8a, which it did. Bakerv. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 207 W. Va. 513, 534 S.E.2d 378 (2000). (See footnote 2)

The Supreme Court of Appeals of West Virginia addressed this statutory provision, and the rights of probationary employees in Miller, supra.

> However, the statute plainly states, in pertinent part, that "the superintendent at a meeting of the board on or before the first Monday in May . . . shall provide in writing to the board a list of all probationary teachers that he recommends to be **rehired** for the next ensuing school year." **W. Va. Code**, 18A-2-8a [1977] (emphasis added). There is no mention of a hearing being held before the first Monday in May nor is there any mention of the superintendent having to provide a list of those probationary employees who are not being rehired. There is also no mention of the board of education having to take some action to not rehire probationary employees. The only mention of probationary employees who are not being rehired is that they are to be provided notice of the nonrenewal of their contract, and if requested, a statement of the reasons for the nonrenewal of the contract and a hearing.
>
> . . .
>
> Not only is **W. Va. Code**, 18A-2-8a [1977] clear that no affirmative action is required when not rehiring a probationary employee, but that is the only interpretation which makes sense because a probationary employee's contract is for one year and the contract automatically expires if it is not renewed without any affirmative action by the board of education.

The Court stated in Syllabus Point 6, " **W. Va. Code,** 18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees other than notifying the employees that they will not be rehired, and if requested, providing a reason for the nonrenewal and a hearing." "In Miller the grievants received notice prior to the board meeting that their probationary contracts would not be renewed. Since the grievants were not harmed by this early notice the Court stated this harmless error 'does not require reversal of the final judgment.' Id. at Syl. Pt. 5." Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

The Supreme Court of Appeals of West Virginia has further held that the concept of "due

process" does not apply to nontenured personnel, because they do not have a "property interest" in their jobs. Miller, supra (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)). This Grievance Board has held that W. Va. Code § 18A-2-8a does not require a pre-termination hearing when a board of education is not renewing a probationary contract of employment.

> When a probationary contract is not renewed per the procedure set forth in Code § 18A-2-8a, the board is "not required to convene a pre-termination hearing because Grievant, in effect, was not terminated; rather, [her] contract, which is probationary and thus affords [her] no property interest in [her] employment, was not renewed." Cordray [v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991)], [citing Belota v. Boone Co. Bd. of Educ., Docket No. 90-03-252 (Nov. 30, 1990); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) and Roth, supra]. Even if the reasons for non-renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in Code § 18A-2-8a. See Burrows v. Wood County Bd. of Educ., Docket No. 96-54-281 (Oct. 24, 1996). Accordingly, Grievant was not entitled to any advance notice of the Board's decision, nor was [the Board of Education] required to follow the provisions of Code § 18A-4-8.
>
> Therefore, it must only be determined whether the provisions of the applicable statute, Code § 18A-2-8a, were followed. In order to comply with that provision, a board of education need only notify the employee of its decision by certified mail within ten days, which was undisputedly done by the Board in this case. Then, if the employee so requests, the Board must provide the reasons for the decision in writing and a hearing. Miller, supra.

Baker, supra.

As to Grievant Pendleton's claim that she was discriminated against, or that favoritism was shown because other probationary employees received written notice and the opportunity to request a hearing in conjunction with the decision not to renew their contracts, she has not made a prima facie case of discrimination. W. Va. Code § 18-29- 2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

W. Va. Code § 18-29-2(o) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

In order to establish a prima facie case of discrimination or favoritism, a grievant must demonstrate the following:

(a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,

(c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext." Steele, supra.

Grievant Pendleton has not been the victim of discrimination or favoritism. RBOE treated Grievant Pendleton in the same manner as it treated all other probationary employees. It provided her with oral notice that her contract would not be renewed, and it mailed her written notice by certified mail, at approximately the same time it mailed such notice to other employees. Through no fault or design of RBOE, Grievant Pendleton's letter was simply lost by the postal service. This was outside the control of RBOE. See Harper v. Mingo County Bd. of Educ., Docket No. 00-29-310 (Nov. 27, 2000). Further, inasmuch as Grievant Pendleton was near the bottom of the seniority list, and there were many service personnel who were reduced-in-force due to reduced funding, had Grievant Pendleton received a hearing before RBOE, it would not have changed the outcome.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievants to prove the elements of their grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct.

31, 1996).

2. "W. Va. Code §18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees." Syl. Pt. 6, Miller v. Bd. of Educ. of Boone County, 190 W. Va. 153, 437 S.E.2d 591 (1993).

3. W. Va. Code § 18A-2-8a requires a county board of education to provide “after-the-fact” notice to a probationary employee that it has decided not to renew hercontract. If the employee so requests, the board must provide the employee a list of reasons for the decision and a hearing on those reasons. Miller, supra.

4. A probationary employee whose contract is not renewed has no property interest in her employment, is not entitled to due process of law, and does not have a right to a pre-termination hearing or notice. Miller, supra; Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 207 W. Va. 513, 534 S.E.2d 378; Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

5. As a probationary employee, Grievant Pendleton had limited statutory rights. She was not entitled to advance notice that her contract would not be recommended for renewal. The fact that RBOE gave her oral notice of the superintendent's recommendation, and attempted written notice, does not change the statutory procedure. Miller, supra. RBOE was only required to follow the procedures set forth in W. Va. Code § 18A-2-8a, which it did. Baker, supra.

6. In order to establish a prima facie case of discrimination or favoritism, a grievant must prove:

> (a) that [he] is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded [him]; and,
>
> (c) that the difference in treatment has caused a substantial inequity to [him], and that there is no known or apparent justification for this difference.

Board v. Div. of Rehabilitation Services, Docket No. 00-RS-216 (Sept. 22, 2000); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); McFarland v. Randolph County Bd. of

Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate,nondiscriminatory reason" for its action. A grievant may still prevail by establishing that the rationale given by the employer is "mere pretext." Steele, supra.

8. RBOE treated Grievant Pendleton in the same manner it treated every other probationary employee whose contract was not being renewed. The act of a third party, the postal service, in losing Grievant Pendleton's notification letter, does not amount to discrimination or favoritism on the part of RBOE.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 5, 2001

Footnote: 1

Grievant Pendleton filed her grievance on or about April 10, 2001. Her supervisor responded at Level I on April 10, 2001, that she was without authority to resolve the grievance. The remaining Grievants filed their grievances on or about April 11, 2001, and received a response on that date that the Level I supervisor was without authority to grant relief. Grievants appealed to Level II, where the grievances were consolidated. A Level II hearing was held on June 4, 2001. A Level II

decision denying the grievance was issued on June 7, 2001. Grievants waived Level III, appealing to Level IV on June 14, 2001. A Level IV hearing was held on July 17, 2001. Grievants Pendleton, Rupe, Darnell, Hungate, King, Lynch, Saddler, and McDaniels were represented by John Everett Roush, Esquire. The remaining Grievants represented themselves, although not all the Grievants appeared at the Level IV hearing. Respondent was represented by Erwin L. Conrad, Esquire. This grievance became mature for decision upon receipt of the parties' written arguments on August 14, 2001.

Footnote: 2

W. Va. Code § 18A-2-8a, entitled "Notice to probationary personnel of rehiring or nonrehiring; hearing," provides as follows:

> *The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five [§§ 18A-2-4, repealed and 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.*
>
> *Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.*