DEBRA WILEY,

Grievant,

v. DOCKET NO. 01-41-531

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant, Debra Wiley, against Respondent, Raleigh County Board of Education ("RBOE"), on April 13, 2001. The statement of grievance as submitted at Level IV reads:

> Grievant is a substitute school bus operator employed by Respondent. During the 2000-2001 school year and for more than five years prior to that year, substitute service employees received certain benefits of regular employment after the substitute had served in a non-posted position for a specified number of days consecutively. Many of these benefits were funded by the local levy. Although, the Respondent did not suffer the defeat of the levy nor a loss in assessed values of property, it nevertheless removed said benefits from Grievant and other substitutes for the 2001-2002 school year. Grievant contends that Respondent violated West Virginia Code §18A-4-5b and the terms of its own levy call.

As relief, Grievant requested at Level IV:

> (a) reinstatement of the policy of granting to substitutes in non-posted long- term positions those benefits of regular status which are funded by the levy; (b) compensation for any and all wages, and all benefits (pecuniary or non- pecuniary) lost by Grievant as a result of Respondent's action for the 2001-2002 and future school years; (c) interest on any sums to which she is entitled. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant has been employed by RBOE as a substitute bus operator for two years.
2. For approximately eight years, until the 2001-2002 school year, RBOE had provided certain

benefits to substitutes who were called to work from the substitute rotation list, once they had served in a position for more than 20 days, if they were still serving in the position on the first day of the following month. The benefits provided were health, dental, optical, and life insurance, personal leave, accrued at the rate of one and a half days per month, and holiday and snow day pay.

3. On March 6, 2001, RBOE notified Grievant that, effective July 1, 2001, it would be "eliminating the practice of granting regular employee benefits to substitute employees in long-term positions [called off the rotation list]. These benefits include holiday and snow day pay falling within a long-term assignment, the accumulation and use of personal leave days, the bonus pay for unused personal leave days, as well as the availability of health, dental, optical, and life insurance." This would not apply to substitutes serving in posted positions. 4. On March 28, 2001, RBOE notified Grievant that the recommendation of Dr. Charlotte Hutchens, Interim Superintendent, to eliminate the benefits identified in the March 6, 2001 letter, had been approved by RBOE at a meeting on March 27, 2001.

5. At the time she filed her grievance, Grievant had never served in a position for more than 20 days, and had never received any of the benefits detailed above.

Discussion

The first issue to be addressed is Respondent's argument that Grievant does not have standing to pursue this grievance, because, at the time the grievance was filed, she was not serving in a position which would have received benefits in past years, nor had she ever served in such a position. Grievant responded that if she had waited until she actually worked in a position which would have in the past received benefits, she would have risked having her grievance dismissed as untimely, because she did not file when the event became known to her.

A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). In Farley v. West Virginia Parkways Authority, Docket No. 96-PEDTA-204 (Feb. 21, 1997), the grievant was not allowed to grieve the alleged misapplication of a nepotism policy, even though it was possible that if one employee provided preferential treatment for his spouse, this could impact the grievant. However, this had not occurred,

and such a potential action was found too speculative.

While Grievant had not been directly impacted by RBOE's action at the time she filed her grievance, she had just as much of a chance as any other substitute employee of landing an affected position at any time, and had, in fact, received three such positions during the 2001-2002 school year, prior to the Level IV hearing. The undersigned finds thatit was not speculative that Grievant would be adversely affected by the change in benefits, and that she had a personal stake in the outcome of the grievance, and thus has standing to file a grievance.

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Relying on W. Va. Code §§ 18A-4-5(b) and 18A-4-8(m), Grievant argued RBOE was obligated to continue to provide the same benefits to substitutes which it had provided at least since the passage of the last local levy, as there has not been a loss of assessed value of property or a defeat of a local levy.

W. Va. Code § 18A-4-5(b) provides as follows:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
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> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.
>
> Counties may provide, in a uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the state teachers' retirement system. Nothing herein shall prohibit the maintenance nor result in the reduction of any benefits in effect on the first day of January, one thousand nine hundred eighty-four, by any county board of education.

Grievant pointed to a case which was not favorable to her argument, Robbins v. McDowell County

Board of Education, 186 W. Va. 141, 411 S.E.2d 466 (1991), and argued it is not dispositive, because the statutory provision applicable to professional personnel, and which was at issue in that case, is different from the statutory language of W. Va.Code § 18A-4-5(b). While the statutory language is not identical, it is sufficiently similar for Robbins to control the outcome here with regard to the proviso quoted above. Further, the same reasoning is applicable.

Syllabus Point 5 of Robbins states:

> "The function of a proviso in a statute is to modify, restrain, or conditionally qualify the preceding subject to which it refers." Syllabus Point 2, State v. Ellsworth J.R., 175 W. Va. 64, 331 S.E.2d 503 (1985).

The Court in Robbins found that the proviso at issue, which was in the second paragraph of the statute, applied to the first paragraph of the statute, based upon the specific terminology used in the proviso. In this case, the proviso refers to "establishing such local salary schedules," and no reduction of "local funds allocated for salaries." As in Robbins, and as Respondent pointed out, the proviso at issue here clearly refers to the salary schedules discussed in the first paragraph of the statute, and the first sentence of the second paragraph of the statute. As in Robbins, the proviso does not apply to the language, "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." Assuming W. Va. Code § 18A-4-5b applies to substitutes, which in the opinion of the undersigned it does not, the proviso does not apply to the reduction of benefits such as insurance, holiday pay, and accrual of leave.

Further, as Respondent also pointed out, these benefits were not in effect on January 1,1990, nor was the special levy in effect on January 1,1990, thus, again the proviso is clearly not applicable here.

Grievant also pointed to W. Va. Code § 18A-4-8(m), which provides:

> No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

Respondent argued W. Va. Code § 18A-4-8(m) is not applicable, because it clearly applies to

regular employees, and does not apply to substitutes. The undersigned agrees. The statutory language at issue speaks to “benefits earned during the current fiscal year” and to a reduction in benefits “for which [the employee] would qualify by continuing in the same position.” The entire statute relates to the classification and employment terms of regularly employed personnel. While a substitute called off the roster might possibly continue in the same position the next year, it is not a likely scenario, and is not what this statute is referring to. Even if it were referring to substitutes in general, however, it is not applicable to Grievant as she did not “earn” any such benefits during 2000-2001.

Finally, Grievant cited Crock and Washington v. Harrison County Board of Education, Appeal No. 29988 (February 8, 2002), per curiam, which dealt with W. Va. Code § 18A-4-8(m). As that Code Section is not applicable here, the scope of that decision need not be addressed.

Raleigh County is one of many counties in this state which continues to lose student population, resulting in less state funding. Raleigh County has consequently found it necessary to cut a number of position entirely in order to balance its budget. Unfortunately, it was no longer financially able to provide these benefits to substitute employees.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50- 272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).

2. Grievant has standing to file this grievance. 3. Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

4. Assuming W. Va. Code § 18A-4-5b applies to substitutes, which in the opinion of the undersigned it does not, its proviso applies to salaries. The proviso does not apply to the reduction of benefits such as insurance, holiday pay, and accrual of leave. Further, as these benefits were not in effect on January 1,1990, nor was the special levy in effect on January 1,1990, thus, again the proviso is not applicable here.

5. W. Va. Code § 18A-4-8(m) is not applicable, because it applies to regular employees, and does not apply to substitutes.

6. RBOE was not precluded by any statute, rule, regulation, or policy from reducing benefits to substitute employees in its efforts to make ends meet.

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: April 3, 2002

Footnote: 1

The grievance was denied at Level I on April 13, 2001, as Grievant's supervisor responded that he did not have the authority to grant the relief sought. A Level II hearing was held on August 28, 2001, and a decision denying the grievance at Level II was issued on September 5, 2001. Grievant appealed to Level III, where RBOE waived participation in the grievance on September 25, 2001. Grievant appealed to Level IV on October 8, 2001. A Level IV hearing was held by telephone on February 13, 2002. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Erwin L. Conrad, Esq. This case became mature for decision on March 18, 2002, upon receipt of the last of the parties' written arguments.