ANN TOMBLYN,

Grievant,

v. Docket No. 05-49-239

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Ann Tomblyn ("Grievant"), employed by the Upshur County Board of Education ("UCBE") as a Cafeteria Manager, filed a level one grievance on April 29, 2005, in which she alleged violations of W. Va. Code §§ 18A-2-7, 18A-2-6, and 18A-4-8(m) when she was assigned to a position of Cook II. Grievant seeks reinstatement of her salary as a Cook III/Cafeteria Manager, lost wages, with interest, and benefits, as relief. The grievance was denied at levels one and two. Grievant elected to bypass level three, and appealled to level four on July 12, 2005. Grievant, represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and UCBE counsel Howard Seufer, Jr., of Bowles, Rice, McDavid, Graff & Love, LLP, agreed to submit the grievance for decision based upon the record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before October 24, 2005.

The following facts have been derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Grievant has been employed by UCBE for approximately ten years, and was most recently assigned as a Cook III/Cafeteria Manager at Central Elementary School. Grievant was employed in this capacity under a 200-day contract, at a salary of $20,230.00.

2. Central Elementary School was closed at the end of the 2004-2005 school year.

3. Grievant was not the least senior Cook employed by UCBE, and she was placed on the transfer list for the 2004-2005 school year following a hearing before the board.

4. UCBE subsequently terminated the contract of the employee with the least seniority in

the class titles of Cafeteria Manager and Cook. The position, Cook II at Buckhannon-Upshur High School ("B-UHS"), was then posted.

5. Grievant did not apply for the B-UHS position, but was placed there by board action on May 24, 2005.

6. The Cook II position at B-UHS is for a term of 200 days, for which Grievant will earn $19,640.00.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep'tof Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant argues that her situation is similar to an employee being reduced from full- time to half-time employment, the elimination of a split shift supplement, or reduction of an employment term, all of which require termination of the employee's contract pursuant to W. Va. Code § 18A-2-6. Grievant reasons that it would be strange indeed if a reduction in pay grade would differ from the above-cited situations, and not require termination of her contract. Grievant also argues that the transfer procedure is inadequate in this instance, under the provisions of W. Va. Code §18A-4-8(m) which prohibits the relegation of any service personnel to a condition of employment which would result in a reduction of her salary, without her written consent.

UCBE asserts that it followed the statutory reduction in force procedure when it terminated the least senior employee in the cook classifications, and transferred Grievant into the position held by that individual. UCBE concedes that termination of an employee's contract is be required if there is a change in her contract term. However, UCBE argues that the transfer process was sufficient in this case because Grievant's contract as a Cook for a

200-day employment term remained intact. UCBE denies that the subsequent reduction in Grievant's salary was the result of any action on its part, but rather was due to school laws which establish the salaries of service personnel. UCBE further argues that it is required by these laws to properly compensate employees for the work performed, and the non-relegation clause in W. Va. Code § 18A-4-8, does not entitle employees whoassume lower-paying positions during a reduction in force to retain the higher salaries paid to them in their former jobs.

W. Va. Code § 18A-2-6 states in pertinent part:

The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date . . . .

W. Va. Code § 18A-4-8b(j) provides:

If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: *Provided*, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

Grievant was the least senior employee in the classification of Cook III/Cafeteria Manager, and was properly reassigned to Cook II, a classification which she previously held. This reassignment during a reduction in force is accomplished when the displaced employee bids on a position vacancy. In this case, Grievant did not bid on the position, but retained the right to decline the assignment, and remain on the preferred recall list. Because Grievant remained in the Cook classification, and retained a 200-day employmentterm, it was unnecessary for UCBE to terminate her contract, which was, in effect, modified by mutual consent. (See

footnote 1)

W. Va. Code § 18A-4-8(m) states:

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.

Reassignment to a position with a lower salary as a result of a reduction in force must be considered an exception to this provision. Again, if Grievant did not want to accept the position of Cook II, she could have remained on the preferred recall list.

Finally, it is undisputed that Grievant performs the work of a Cook II, and UCBE is required by W. Va. Code 18A-4-8(l) to insure that all employees are properly classified. Salaries of service personnel employees are determined by their years of employment, and the pay grade of the classification held. Therefore, UCBE had no option but to reduce Grievant's salary when she accepted the Cook II position.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Grievant has failed to prove by a preponderance of the evidence that UCBE was required to terminate her contract during the reduction in force process, or violated W. Va. Code § 18A-4-8, when her salary was adjusted to reflect her revised assignment.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the

Circuit Court of Upshur 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: NOVEMBER 30, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.W. Va. Code § 18A-4-8b(d) states in part:

Each class title listed in [§ 18A-4-8] ...shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment. The cafeteria manager class title shall be included in the same classification category as cooks.