THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TONNA SMITH and

JANET DUNCAN,

Grievants,

v. DOCKET NO. 06-27-223

MERCER COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Tonna Smith filed a grievance on April 21, 2006. Grievant Janet Duncan filed a grievance on April 28, 2006. These grievances were consolidated at Level IV. Grievants allege Respondent violated *W. Va. Code* §§ 18A-4-8b and 18A-4-8g when Grievants were reduced in force for the 2006-2007 school year, but a less senior aide, Donna Green, was not. Grievants seek reinstatement of their contracts as full-time, regular aides, plus back pay with interest, all benefits lost, and reinstatement to any position either would have received but for the reduction in force.

A level four hearing was held in the Grievance Board's Beckley office on September 20, 2006. Grievants were represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by John Shott, Esq. The matter became mature for decision on October 30, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants assert Respondent violated *W. Va. Code* §§ 18A-4-8b and 18A-4-8g. Grievants contend the least senior aide is required to be reduced in force, and Grievantsassert Respondent violated the W. Va. Code by transferring Ms. Green, the least senior aide, to a custodian instead of

terminating her.

Respondent argues that Ms. Green was transferred to fill a vacant custodial position because, prior to becoming an aide, she had been employed by Respondent as both a secretary and a custodian. Therefore, while Ms. Green had less seniority as an aide, she had more overall seniority as an employee.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants were employed as aides by Respondent for the 2005-2006 school year.

2. Prior to the end of the 2005-2006, Respondent determined six aide positions would need to be eliminated.

3. Respondent notified the six least senior aides who had no seniority in other classifications that they would be terminated.

4. Grievants were two of the six aides reduced in force.

5. Donna Green, an aide who had less seniority than the other six who were notified of termination, was notified she would be placed on administrative transfer. Ms. Green was placed on administrative transfer because she qualified for one of the vacant custodial positions.

6. Prior to becoming an aide, Ms. Green had been employed by Respondent as a secretary and custodian. Because of that, Ms. Green had more seniority as an employee. 7. Ms. Green was transferred into a custodial position prior to the beginning of the 2005-2006 academic year.

8. A similar situation occurred at the end of the 2004-2005 school year. Alice Matthews, an aide, was reduced in force. Ms. Matthews had previously been classified as a secretary, but then transferred to the aide classification. Ms. Matthews was not transferred, but instead was reduced in force.

9. When Ms. Matthews was reduced in force, there were no secretarial vacancies.

10. When a secretarial vacancy became available, Ms. Matthews had to bid back into that classification.

Discussion

Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

W. Va. Code § 18A-4-8b(j) reads:

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 inany 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.

Grievants assert this *Code* provision is in conflict with *W. Va. Code* § 18A-4-8g(b) which reads:

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [§ 18A-4-8e] of this article: Provided, That when implementing a reduction in force, an employee with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification title held by an employee within the classification category shall not be taken into consideration when implementing a reduction in force.

While Grievants argue these two statutes are contradictory, Respondent asserts *W. Va. Code* § 18A-4-8g(b) establishes a general rule while *W. Va. Code* § 18A-4-8b(j) refers to a specific circumstance that only occurs in limited circumstances.

Under the in *pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Farley v. Zapata Coal Corp*., 167 W. Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ*.,

Docket No. 92-06-397 (Apr. 16, 1993). Pursuant to this rule, the two statutes set forth above must be read not to conflict with one another, and when that is done it is clear the legislative intent is to preserve, when possible, the on- going employment status of long-time employees.

W. Va. Code § 18A-4-8g(b) clearly states that seniority is accumulated within a particular classification, and when reducing the work force, the employee with the leastseniority in that particular classification shall be released and placed on a recall list. There is no dispute that Ms. Green had the least seniority in the aide classification.

However, upon reviewing Ms. Green's history, Respondent realized Ms. Green had previously been employed by Respondent as both a secretary and a custodian. Given that, Respondent then followed the requirements set forth in *W. Va. Code* § 18A-4-8b(j), and determined there was a vacancy Ms. Green was eligible to fill. So, she was transferred.

This Grievance Board has also held that when a service employee's position is eliminated, the county board must determine whether a vacancy exists within a different grade of that job, and if it does, that employee should fill it. However, if no vacancy exists, the county board should determine whether a vacancy in another classification which the employee previously held exists and fill it with the employee. If no vacancy exists, that employee is then reduced in force. *Compton v. Mercer County Bd. of Ed.*, Docket No. 27- 87-281-4 (Feb. 29, 1988). In a separate case, on the same issue, the Grievance Board determined that, “A service employee who is subject to a reduction in force in his presently- held classification is entitled to alternate placement and must be employed for a position vacancy in another area of employment in which he holds previous service time. W. Va. Code § 18A-4-8b(j).” *Roberts v. Marshall County Bd. of Educ*., Docket No. 91-25-395 (May 31, 1996).

Respondent followed the law as established. However, Grievants assert that Respondent did not transfer Ms. Matthews when she had documented seniority in other classifications. Respondent has sufficiently explained that in the case of Ms. Matthews, at the time of the reduction-in-force, there were no available vacancies that she was ableto fill. Therefore, Respondent had no choice but to terminate her, and then allow Ms. Matthews to bid on positions as they became available. There is no conflict in how Respondent handled these situations, as they were different with respect to the availability of other positions.

The following conclusions of law support this discussion:

Conclusions of Law

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. Under the in *pari materia* rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); *Farley v. Zapata Coal Corp*., 167 W. Va. 630, 281 S.E.2d 238 (1981); *Eastham v. Cabell County Bd. of Educ*., Docket No. 92-06-397 (Apr. 16, 1993).

3. When a service employee's position is eliminated, the county board must determine whether a vacancy exists within a different grade of that job, and if it does, that employee should fill it. However, if no vacancy exists, the county board should determine whether a vacancy in another classification which the employee previously held exists andfill it with the employee. If no vacancy exists, that employee is then terminated. *Compton v. Mercer County Bd. of Ed.*, Docket No. 27-87-281-4 (Feb. 29, 1988).

4. “A service employee who is subject to a reduction in force in his presently- held classification is entitled to alternate placement and must and must be employed for a position vacancy in another area of employment in which he holds previous service time. W. Va. Code § 18A-4-8b(j).” *Roberts v. Marshall County Bd. of Educ*., Docket No. 91-25- 395 (May 31, 1996).

5. *W. Va. Code* §§ 18A-4-8b and 18A-4-8g are not inconsistent with each other.

6. Grievants failed to meet their burden of proving Respondent violated any statute, law or policy.

Accordingly, this grievance must be **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty 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: January 5, 2006

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Wendy A. Campbell

Administrative Law Judge