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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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RHONDA CLINE

v.

Docket No. 15-88-011-3

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Rhonda Cline, grievant, was employed by the Hancock County Board of Education as a substitute bus operator from 1981 until the removal of her name from the classified substitute list by board action on January 11, 1988. Grievant filed a level four appeal protesting the board's action which was acknowledged by the Grievance Board January 21, 1988. After clarification that the school board's action was a dismissal pursuant to W.Va. Code, 18A-2-8 and lower level proceedings were unnecessary, an evidentiary hearing was conducted March 9, 1988. The board submitted proposals on March 29, 1988 and although grievant's attorney was given an extension of time to submit his proposals, none had been tendered as of this writing.

When the 1987-88 school year began, grievant notified persons in the transportation department that because of her part-time position with the United States Postal Service she would be unable to drive on the days she worked for that agency. She claimed that she told her supervisors that if it ever became a problem, to let her know and she would make a decision about which employment she would retain.¹ Between September 13, 1987 and November 17, 1987 grievant had refused available work at least 15 times and, in accordance with county policy, she was sent a warning letter by certified mail dated November 17, 1987. By response letter dated December 2, 1987 and received by the board office on December 4, grievant wrote of her part-time employment with the Postal Service and noted she could drive more often after the holidays. She concluded with a hope that in consideration of her excellent past attendance record she could remain on the substitute list and requested the superintendent's "final decision."

Of record is copy of a letter dated December 4, 1987, sent by certified mail, from the superintendent to grievant (the board acknowledges it did not receive the return card). The letter states, "According to our rules you must be available to drive when we need you." The superintendent requested that she clarify

¹ Grievant had secured the postal position earlier that year and had not bid on at least one opening in the transportation department in hopes she could secure full-time employment with the Postal Service. (T.50,51).

what she meant by not always being available to drive. Between November 17 and December 4, 1987 grievant refused work five times and she had not responded to the superintendent's letter. Consequently she was recommended for dismissal and was so notified January 13, 1988 of the board's action on January 11, 1988.

Among other things, the board states that grievant did not return her signed 1987-88 contract despite several calls to her home to inquire about the matter and it argues that she has forfeited her right to employment as per W.Va. Code, 18A-2-5. A board employee testified that grievant was not at home when the calls were placed but messages were left with the persons who answered that she should call the board office about her contract. The board's counsel contends that, while he could not blame grievant for wishing to obtain a more lucrative position with the post office, her refusal to bid on job openings in the past and her refusal to perform available work under her board contract does not now give her the right of employment protection absent responsibility to her position on her part. Finally, the board claims that it followed county procedure regarding substitute service personnel who refuse work and thus the dismissal was justified pursuant to W.Va. Code, 18A-2-8 and it urges the dismissal decision be affirmed.

Grievant claims she did return her contract and she knew of no phone calls to her home asking about the matter. She claims she never received the superintendent's letter dated

December 4, 1987 and urges that she was entitled to a conference with school officials prior to her dismissal in accordance with county disciplinary policy.² Grievant's counsel urges that the dismissal was flawed in all respects: the board did not notify grievant that dismissal proceedings were being considered pursuant to W.Va. Code, 18A-2-5, non-return of her contract; that if it did act on the requirement that the contract be returned, notice would still be required; and finally, that the superintendent testified that the contract issue had nothing to do with his decision to recommend the dismissal. With respect to the dismissal proceeding pursuant to W.Va. Code, 18A-2-8, counsel argues that a dismissed employee is entitled to know the charges upon which the dismissal was based and the board's notice of January 13, 1988 contained no such statement.³

² Counsel for the board thought it odd that grievant, who worked in the post office where her personal mail was received, did not receive the superintendent's December 4, 1987 letter sent by certified mail and also that the board never received the return card on the November 17, 1987 warning letter sent by certified mail which grievant obviously received. There was discussion of putting a tracer on the articles, but no further information on the matter was forwarded to the examiner.

³ Counsel for grievant thought it odd that the board would send the December 4, 1987 letter of inquiry to grievant by certified mail yet send the official statement of her release by regular mail.

Grievant requests that the board rescind its action of January 11, 1988 in order that grievant be reinstated at the top of the seniority list in which she resided at that time. As grievant applied for several full-time positions subsequent to her dismissal she further contends that her substitute seniority would entitle her to one of the positions had she not been improperly dismissed. She requests placement into the first position for which she would have been entitled, seniority wise, plus appropriate back wages.⁴

W.Va. Code, 18A-2-8 provides that a board of education may dismiss an employee at any time for immorality, incompetency, cruelty, insubordination or willful neglect of duty and the charges shall be stated in writing and served upon the employee within two days of board action. The board claims grievant's dismissal was effected pursuant to the statute and there was no due process violation, however, failure to state the statutory grounds before or after the dismissal and failure to at least state the dismissal grounds at the level four hearing has flawed the procedure to the extent that the dismissal cannot be upheld.

⁴ At the conclusion of the level four hearing the parties indicated they would submit further evidence with respect to the issue of alleged back wages and other matters, but nothing was submitted as of this writing. Due to the ultimate disposition of the grievance issues, the materials are not necessary for any determinations herein.

However, grievant's claim to entitlement to a regular bus operator position based on her seniority is without merit and the Grievance Board cannot order her instatement to a position on that basis. While her seniority places her in a preferred position, no school employee has an automatic seniority right to any position for which they vie. Grievant's prior lack of interest for full-time employment and documented repeated refusal to accept work under the terms of her employment is evaluative in nature and seniority, qualifications and past evaluations are all of the components a board must consider when hiring service personnel pursuant to W.Va. Code, 18A-4-8b(a).

In addition to the foregoing narration, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant had been employed by the board since 1981 as a substitute bus operator but her name was removed from the substitute list by board action January 11, 1988. She received a letter dated January 13, 1988 stating that the board approved her removal from the substitute bus drivers position and no grounds were stated.

2. Underlying reasons for the board's action was grievant's repeated failure to respond to numerous opportunities to accept substitute employment from September 1987 until December 1987, said refusals warranting dismissal according to board policy of which grievant was fully aware. Board policy requires that a warning letter be sent after three refusals to accept work reminding the substitute that a conference would be necessary with the superintendent or his designee on the matter. Grievant was sent a warning letter on December 17, 1987 after fifteen refusals with reminders that her name could remain on the driving list only if she were available for work as needed and that she must respond by December 4, 1987.

3. Grievant responded to the November 19 letter on December 2, 1987 (received by board December 4, 1987). She noted that her present work refusals were based on temporary full-time work (40 hours weekly) at the post office and that she would be working part-time at the post office after the holidays and would therefore be available to drive "some each week" thereafter. She reminded the superintendent of her seven years board employment and her past prompt response to call out work and requested some word as to his "final decision."

4. There was conflicting testimony and other evidence with respect to whether grievant returned her signed 1987-88 contract of employment after calls to her residence inquiring of the matter and whether grievant received a December 4, 1987 letter from the superintendent sent by certified mail inquiring as to her intentions regarding future call-outs to work because, "[a]ccording to our rules you must be available to work when we need you."

5. While grievant's refusal to respond to the work needs of her board of education employer for the sake of her postal services employer was based on her own need to secure full-time employment and the best possible future full-time employment, the board of education had no duty to provide grievant endless opportunities to retain her board employment when she constantly refused work and was cognizant of the consequences of her actions that she may be dismissed.

6. The board did not follow its established disciplinary procedures and attempt to contact grievant for a pre-termination conference and it acted in violation of W.Va. Code, 18A-2-8 when its termination letter of January 13, 1988 did not inform grievant with some particularity of the charges for its dismissal of her from its employ on January 11. Moreover, it failed to state the statutory charges at the level four hearing on March 9, 1988, thus the dismissal action violated grievant's due process rights and is void as a matter of law.

7. Grievant's right to be reinstated to her position as substitute bus operator with the board with her seniority intact does not give her a "seniority right" to be automatically instated to any of the vacant, full-time bus operator's position for which she applied subsequent to her wrongful dismissal.

CONCLUSIONS OF LAW

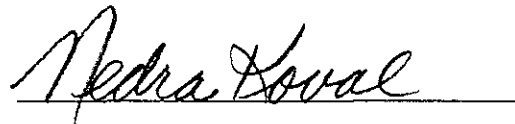
1. Absent a showing by a board of education that its dismissal of an employee premised upon W.Va. Code, 18A-2-8 met with all due process requirements, such dismissal is void and of no effect.

2. A board of education must make hiring decisions of its service personnel positions on the basis of seniority, qualifications and past evaluations and a board is not required to retain or employ personnel, regardless of their seniority, who have frequent unexcused absences and who neglect their employment duties or otherwise do not meet the qualifications of the position. W.Va. Code, 18A-4-8b(a). See, Garcia v. Marshall County Board of Education, Docket No. 25-87-274; Cheripko v. Brooke County Board of Education, Docket No. 5-86-217.

The grievance is **GRANTED** to the extent that grievant is to be reinstated as a substitute bus operator with her seniority intact but **DENIED** as to her request that she be automatically instated in a full-time position that became available subsequent to her dismissal. However, the board is obligated to reconsider grievant's applications for the posted positions following the mandates of W.Va. Code, 18A-4-8b(a).

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED: June 16, 1988

A handwritten signature in cursive script, reading "Nedra Koval", is written over a horizontal line.

NEDRA KOVAL
Hearing Examiner