



**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

JIMMIE W. GRAHAM

v.

Docket No. 55-88-141

WYOMING COUNTY BOARD OF EDUCATION

DECISION

In this grievance Jimmie W. Graham (Grievant) is protesting the reduction-in-force (RIF) action of Respondent Wyoming County Board of Education (Respondent) abolishing his position of Assistant Transportation Director for the county schools and terminating his employment prior to the 1988-89 school year, effective July 1, 1988.¹

¹ Respondent attempted to accomplish termination of Grievant's employment by a reduction-in-force action also the year before, but the decision of Jimmie Graham v. Wyoming County Board of Education, Docket No. 55-87-183 (October 30, 1987), declared that the board's refusal to reschedule a hearing on the termination of Grievant's employment in order to give him time to obtain counsel was illegal and denied Grievant due process of law. Reinstatement of the grievant to his employment as Assistant Director of Transportation was ordered.

The grievance was filed at Level I on April 1, 1988, alleging five counts of improprieties of the superintendent of Wyoming County schools Gerald L. Short and Respondent board of education in terminating Grievant's employment, followed by a second Level I grievance dated April 25, 1988, alleging that Respondent failed properly to put Grievant on a transfer list when he was being "transferred" to the preferred recall list in April 1988.² The two grievances were consolidated by agreement of the parties. After an informal Level II hearing, held on May 12, 1988, the grievance was denied by Mr. Short on May 16, 1988. Grievant filed a Level III appeal³ and a hearing at that level was waived. The Level IV appeal was filed July 11, 1988, and the hearing was held August 17, 1988.

² At the level IV hearing Grievant's counsel contended that, while the board of education was required to comply with W.Va. Code 18A-2-6 in terminating Grievant's employment, in addition the board was required to comply with the procedures for a transfer mandated by W.Va. Code 18A-2-7 when placing him on the preferred recall list. Counsel for Grievant has not pursued the argument in his proposed findings of fact and conclusions of law or his supporting brief and therefore may have abandoned it. In any case, the argument need not be addressed, due to the fact that the first grievance is granted on other grounds, infra, rendering the issue moot.

³ The parties did not supply a copy of the Level III appeal form to the undersigned. However, of record is a June 7, 1988, letter from Mr. Short regarding waiver of Grievant's "Level III grievance." The parties are also in apparent agreement that such an appeal was filed.

The history of the termination proceedings is as follows:
On March 8, 1988, Mr. Short wrote Grievant of his intent to recommend to the board of education that Grievant's position of Assistant Transportation Director be eliminated, stating,

I base this decision on the reduced enrollment we have experienced which has created a lack of funds needed in every phase of our educational program. The decision is also due to the necessity for a reduction in force created by the financial need to reduce staff to a level of 34/1000 for service personnel as supported by the State Aid Formula.

Respondent Exhibit 2. In response to Grievant's request for a formal statement of reasons for his intention to recommend terminating Grievant's employment, Mr. Short iterated the same reasons in a letter of March 24th. Respondent Exhibit 3. A hearing was held before the board of education on March 31, 1988, regarding Grievant's termination and, while the board's vote is not of record, the parties are in apparent agreement that a few days after the hearing the board did formally vote to terminate Grievant.

While Grievant has made a variety of contentions regarding alleged improprieties of the board in scheduling and conducting the March 31, 1988, hearing,⁴ those issues do not require

⁴The primary contentions of Grievant regarding the March 1988 hearing are that board members were biased against Grievant or had made up their minds prior to the hearing; that the board members were unaware of the duties of the position of Assistant Transportation Director and could not be properly informed thereof due to a failure to evaluate Grievant during the 1987-88 school year; and that the meeting was prematurely held in that Mr. Short's recommendation was also a grievable matter and the board was constrained from proceeding on the termination itself until procedures for a grievance regarding the recommendation had been followed and exhausted.

resolution because the board's elimination of Grievant's position as Assistant Transportation Director, a service employee position, cannot be sustained on this record.

Respondent proffers the following standard of review of its actions:

The Superintendent has the right to recommend, and the Board has the right to abolish, a particular position not created by statute, so long as such abolition is not proved by substantial evidence to be arbitrary and capricious or politically motivated to get rid of a particular individual.

Respondent Brief 8. That standard of review is consistent with Hancock v. Kanawha County Board of Education, Docket No. 20-86-108 (July 25, 1986), where this Board upheld a reduction-in-force action requiring transfer of custodial service employees, ruling,

Code, 18A-2-7 vests great discretion in the county superintendent of schools and the county boards of education in transferring school personnel and their decisions will be upheld unless the decisions are arbitrary, unreasonable and contrary to the best interests of the school.

While the procedures of W.Va. Code of 18A-2-6 are applicable to this case rather than those of W.Va. Code 18A-2-7 since Respondent's reduction-in-force action required termination of Grievant's employment, that fact does not in any way require a different standard of review of the RIF action. Whether the action requires the transfer of an individual employee or termination of an individual's employment, a board of education must be allowed the same latitude, the same right to exercise its discretion in administering the county school system.

Nevertheless, when in a grievance procedure the preponderance of the evidence establishes that the board was arbitrary and capricious in abolishing a position and terminating an individual's employment by a RIF action, the burden on the grievant to prove the allegations of his grievance⁵ has been fulfilled and the grievant is entitled to reinstatement. Accordingly, the record in this case must be examined to determine whether a preponderance of the evidence establishes that the elimination of Grievant's position was contrary to the best interests of the school administration or otherwise arbitrary and capricious.

⁵ It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Hanshaw v. McDowell County Board of Education, Docket No. 33-88-130 (August 19, 1988); Andrews v. Putnam County Board of Education, Docket No. 40-87-330-1 (June 7, 1988); Bulford v. Preston County Board of Education, Docket No. 39-87-203 (February 26, 1988).

At both the March 31, 1988 hearing (T.1__) and the Level IV hearing (T.__), Mr. Short testified at length. As he had in his letter of March 8, 1988, to Grievant, his justification for his recommendation to terminate the position was that, because the student enrollment had dropped by 421 students, the appropriations for the 1988-89 school year are \$800,000 below that of the previous year (T.I 9), and therefore the county has been forced to make savings by eliminating 22 teaching positions and 5½ service positions (T.I 46-47). The only transportation position eliminated was Grievant's position of Assistant Transportation Director (T.II 31).

It is pertinent to review the duties of the Assistant Transportation Director in an inquiry whether the position is necessary. Submitted into evidence were the job description of the position dating from 1982 (Grievant's Exhibit 4) and the supplemental job description dating from 1987 (Grievant's Exhibit 5). While the original job description makes various requirements of the Assistant Director in the "area of responsibility" of the position,⁶ it did not in fact define the "area of responsibility." However, it did include the specific

⁶ For example, the job description lists as responsibilities "[l]eadership and support in the area of responsibility," "[e]stablishing and implementing an improvement process for their area of responsibility," and "[e]stablishing good public and employee relations in their area of responsibility."

responsibility of "[e]valuation of personnel under his/her supervision." The generally more specific supplemental job description provided the following "duties of Assistant Transportation Director."

1. Investigate and handle all accidents.
2. Set up appointments with the Director and Superintendent for drivers involved in chargeable accidents.
3. Enforce board policy concerning bus use and storage.
4. Take care of gas and oil in all areas.
5. Cover driver related defects found during inspection with the driver.
6. Any other duties as assigned by Director.
7. Refer all employee, school and parent complaints to Director.
8. All transportation related decisions must be made by Director.

Grievant Exhibit 5. See also T.I 38. When asked why the duty of evaluating supervisees was not included on the supplemental job description, Mr. Short related that the two descriptions were compatible, for the duty of evaluating was includable in the broad provision of "6. Any other duties as assigned by the Director" of the supplemental job description (T. II 41). Mr. Short further explained that, under number 6, there was another duty added in 1987-88 at the request of Director of Transportation Roop and Associate Superintendent Wilcox: observing the operators/custodians, bus operators who work two hours per day as custodians at the schools, and discussing any problems with them that they might have (T.I 39-40).

The duties performed by Grievant, as described in his

testimony, were consistent with the job descriptions. Grievant testified he

rode the school buses a lot of mornings, six o'clock in the morning. A lot of afternoons I was on those buses for the three o'clock and four o'clock runs. During the middle of the day I gathered information from the mornings and afternoon school bus runs to do my evaluations. Usually did the evaluations in February, March, and April.

(T.II 48) He testified that he rode the buses 3 or 4 days a week, and the primary purpose of his riding the buses was to evaluate the drivers (T.II 58). He evaluated seventy-five bus drivers and approximately thirty-five to forty substitute bus drivers. He also was responsible, along with the Director, for training new bus drivers (T.II 48-49). Further, he testified that, while his normal workday ended at five o'clock, he received six to ten calls at home in the evenings.

If there's any bus driver that's got a problem and I make sure Mr. Roop and I sort of split the county up. I sort [of] took care of Herndon, Mullens, Glen Rogers end of the county and he took care of the Baileysville other end and we sort of split up Pineville. And we always like to make sure all of our buses are in.

(T.II 50). He also testified that, when parents complained of actions of bus drivers, he talked with them, and when children were disciplined because of unruly behavior on the buses, he met with the parents, in accordance with the discipline procedures of the county, prior to the children's being reinstated to school (T.II 65-68). Regarding the approximately twenty operators /custodians, Grievant testified that he made sure they went to the schools to which they were assigned for two hours per

day (T.II 63-64). Another duty was his handling of paperwork, including insurance claims, on accidents involving the buses (T.II 19, 61-63).

Grievant also testified that basically all of the duties of Inventory Supervisor, a position he held from the beginning of his employment in 1981 with Respondent until he became Assistant Transportation Director in 1983, he maintained after becoming Assistant Director. Besides inventorying and maintaining parts, as Inventory Supervisor he was responsible for the fuel and oil for the buses (T.II 56-57). That description was consistent with the supplemental job description.

Grievant testified that the responsibilities of the Assistant Transportation Director position have not changed since 1983 (T.II 53). He testified that he was "busy all the time" and "One gentleman cannot do it all." Further, he testified that when he was reinstated in November, 1987, see n. 1, there was a backlog (T. II 53-54). Immediately upon his return he went to Georgia to get buses, for "Mr. Roop was too busy; he couldn't go; he had to send me and I've been going every year" (T.II 53). However, he also testified that he was not allowed to do most of the duties he had done previously, most notably the evaluations of the bus operators and substitutes, and that neither he⁷ nor the operators were evaluated (T.II 57-58).

⁷ Submitted in the record was the most recent evaluation of Grievant, dated March 10, 1986, where Mr. Roop simply stated, "Doing good job." Grievant Exhibit 1. Mr. Short also agreed that he never had any question that Mr. Graham did a good job (T.II 23). Grievant testified he had never had a bad evaluation (T.II 51).

When asked why the job was needed, Grievant responded,

[T]his job is needed because each and every individual in Wyoming County that is in the transportation department deserves evaluation. The law says that they have to be evaluated every year and they weren't evaluated this school year. Mr. Roop told me himself that he did not have the time. I asked Mr. Roop about evaluations and he said, "Mr. Graham, I didn't have time."

(T.II 52) On cross-examination, Counsel for Respondent further questioned Grievant:

MR. MOLER: Did Mr. Roop tell you recently that he could handle all the work of the assistant as well as his own work?

MR. GRAHAM: No, Sir. Mr. Roop did not tell me that.

MR. MOLER: Did you ask him about it?

MR. GRAHAM: I talked to Mr. Roop a couple of times about the assistant transportation's job and he admitted to me that he just didn't have time to do evaluations. So, you know, that told me that there was some parts of the job that he just didn't have time to do.

(T.II 69). That evidence was not contradicted by Mr. Short. Conceding that Grievant had done the evaluations in the past (T.II 41), he stated he did not know if the employees were evaluated by Mr Roop, and conceded, "I know Mr. Graham was not evaluated" (T.II 21,33).⁸

⁸ Mr. Short stated, "Since Mr. Graham did not come to work until sometime in November of last year and we did not evaluate him because of the grievance last year, and he was not evaluated for the rest of the year" (T.II 21). No explanation was made as to why "the grievance" excused a failure to evaluate Grievant.

The only evidence proffered in any way responding to Grievant's testimony was the followed signed, but unsworn, statement from Mr. Roop, dated August 16, 1988:

I, Vernon Roop, Transportation Director for the Wyoming County Board of Education, Pineville, West Virginia, do hereby state that I am able to operate the Transportation Division of this school system with the present personnel employed.

Also, I attest that I have directed the Transportation Division of the Wyoming County School System in the past without an Assistant Director. I am able to perform my duties as Director efficiently with or without an Assistant Director.

Respondent Exhibit 4. This statement cannot rebut the evidence establishing that Mr. Roop did not properly evaluate his super-
visees and therefore failed to carry out the mandate that all education employees be evaluated on a regular basis. West Virginia Board of Education Policy 5300 (6) (a); Mason County Board of Education v. State Supt. of Schools, 274 S.E.2d 435 (W.Va. 1981). The general statements of ability to operate the division and to perform his duties may mean that, while without an assistant Mr. Roop may be able to "operate" the division, such operation may be without fulfilling all required duties or without proper consideration of the safety of the children or the best interests of the school. See Hancock v. Kanawha County Board of Education, supra.

Nor does Mr. Roop's statement that he has been Director without an Assistant Director before, with the implication that he accordingly can do it again, stand scrutiny. Mr. Roop became Director in 1982 (T.I 342),⁹ when Grievant was Inventory Supervisor (T.I 33, T.II 56). Although there was no Assistant Director at that time, Grievant testified that he was assigned many of the duties of the Assistant Director in 1982 (T.II 59). After Grievant became Assistant Director in 1983 (T.II 46), he carried out the duties of Inventory Supervisor, in addition to the duties of Assistant Director. The position of Inventory Supervisor was left unfilled and then combined with the Assistant Director position (T.II 56). This evidence establishes that, while Mr. Roop has been without an Assistant Director in title, Mr. Graham has always been assisting him either as Inventory Supervisor with the duties of the Assistant Director or as Assistant Director with the duties of the Inventory Supervisor. Mr. Roop has never had to run the division

⁹ Prior to becoming Director, Mr. Roop was Assistant Transportation Director from 1977, when the position was created (T.II 47).

alone, and there is no evidence on this record indicating he can do so that conflicts with the evidence that he was unable to do so when Grievant was not allowed to do all his duties in the 1987-88 school year.

Furthermore, there is no evidence in this record contradictory of Grievant's testimony that the responsibilities of the Assistant Director position remained constant. In fact, Mr. Short's testimony is corroborative.

MR. DAMRON: ...And isn't it true that for the last three or four school years the approximate number of bus runs and the number of schools served are the same? Virtually the same.

MR. SHORT: Virtually the same mainly because of the trips. Since we've lost over a thousand students it doesn't necessarily mean that we had to reduce our bus run because students are still splattered throughout the county.

MR. DAMRON: In fact, Mr. Short, there are certain fixtures, fixed matters, that have to do with transportation that are not affected by the loss of population until you really start closing the schools, is that not correct?

MR. SHORT: I would say yes.

MR. DAMRON: And the fact is safety, federal and state regulations, promoting safety, require certain matters regarding transportation to be kept at a certain level notwithstanding the number of pupils that might be decreased, isn't that correct?

MR. SHORT: Yes, sir.

MR. DAMRON: So that within the aegis of the transportation department over which Mr. Graham was assistant director was performing his duties, there are virtually the same number of employees and as you've already testified, the same number of bus runs and the same number of services being given.

MR. SHORT: I can say yes with exception. This year we are terminating and combining bus runs, three runs in particular...

(T.II 32-33). The three bus runs being terminated will lower the total from the 75 that have been in place for a number of years to 72.¹⁰ There was no indication that the consolidation of 3 bus runs out of 75 would have a material impact on the amount of work of the division.

Indeed, there was no evidence that the loss of students would in any way reduce the workload and responsibilities of the Director and Assistant Director positions, as those positions were constituted prior to termination of Grievant's position. When Grievant was questioned by Respondent's counsel as to

¹⁰ At the March 1988 hearing Mr. Wilcox, who had been Director of Transportation at the time the Assistant Transportation Director position was created, made clear that the position was created when the number of bus runs went from in the fifties to the seventies (T.I 31).

whether, due to the fewer number of students, the discipline problems would be reduced, Grievant responded that the effect would be "[v]ery little because...you take seventy-five bus runs and you have an enrollment loss of three hundred kids, you may take, what, three kids off of each bus or something. And maybe five kids off of this bus and none off this bus" (T.II 70). As his testimony, supra, shows, Mr. Short never did provide any concrete support for why there was a lack of need for the position. Instead, he merely relied on his own unsupported subjective view that the job had never been needed (T.II 92) and is not needed now. When pressed for justification, he testified as follows:

MR. SHORT: ...When you lose that many students, one eighth or one ninth of the student body, based on what Mr. Graham has testified, a lot of discipline problems come up. You should have one eighth or one ninth less. Now, I didn't justify it in those terms but this is part of the total reasoning. You have to look around and look at the staff that you have and where you feel is, in your own mind, that you could do with less people.

MR. DAMRON: Basically it comes out...

MR. SHORT: That's where I chose.

MR. DAMRON: Basically it comes down to an arbitrary decision by yourself, doesn't it?

MR. SHORT: Sometimes that's true when you make the recommendation.

MR. DAMRON: Based upon your own subjective reasoning.

MR. SHORT: Sometimes that's true.

MR. DAMRON: Okay. So you had no real objective plan which included going out and having the staff to examine the positions within the county and to find substantive reasons to eliminate certain positions throughout the county. You had no cohesive plan, it was basically a subjective decision on your part.

MR. SHORT: We did have a plan to reduce personnel but when it came to the transportation division, it was mostly my decision. Mostly.

MR. DAMRON: You just decided that you didn't believe that job was needed and you recommended its termination. That's it, isn't it?

MR. SHORT: Based on my knowledge of the transportation division and the personnel we had involved in it.

MR. DAMRON: And you've testified that your knowledge of the transportation division is that it is that it has essentially the same amount of work and duties for the past four years.

MR. SHORT: Essentially. My main thrust was lack of need. In my judgement.

(T.II 101-102).

If Mr. Short had in some way explained how the Transportation Department could properly be run without the Assistant Transportation Director, if there had been some showing of lack of need in rebuttal to the evidence showing that the necessary functions of the department were not carried out

with elimination of the position, if Respondent had in some way shown that real thought had gone into elimination of the position, there may not have been any showing of arbitrariness. However, without any rebuttal evidence whatsoever, the only decision that can be made is that the preponderance of evidence establishes that the decision to eliminate the position was arbitrary and capricious.¹¹

¹¹ Respondent proposes as a conclusion of law:

Should there be evidence that the Director of Transportation is unable to perform all the duties that have heretofore been done by him and an "Assistant Director" as efficiently as when such two persons worked together, that is a matter for the Board of Education, subject to possible impeachment; not for decision by the Grievance Board.

Under this proposal a board of education would be free to abolish any position in the education system, no matter how needed the position, merely on the basis that such elimination is needed in order to save money. It would allow for discrimination and is contrary to the "arbitrary and capricious" standard which is otherwise proposed, see p.4, and is being applied here.

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

FINDINGS OF FACT

1. Pursuant to a reduction-in-force action Respondent board eliminated the position of Transportation Assistant Director and terminated Grievant's employment, effective July 1, 1988.
2. The Assistant Transportation Director position was created when the responsibilities of the Transportation Division expanded and no significant reduction in the responsibilities has occurred.
3. The Board's only justification for eliminating the Assistant Transportation Director position was to save the salary of the position.
4. Grievant and bus operators were not evaluated during the 1987-88 school year.
5. The Director of Transportation is unable to carry out all the responsibilities of his position and those of the Assistant Transportation Director as well.

CONCLUSION OF LAW

1. When the preponderance of evidence establishes that a decision to eliminate a grievant's position by a reduction-in-force action was arbitrary and capricious, the grievant is entitled to reinstatement. See Hancock, supra.

The grievance is granted and it is accordingly **ORDERED** that the action of the school board in abolishing grievant's position and terminating his employment is void and of no force and effect. Grievant is reinstated to his former position as assistant transportation director with appropriate back pay, less any appropriate set off.

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



SUNYA ANDERSON
HEARING EXAMINER

Dated: October 12, 1988