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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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PATRICIA PAYNE

v.

Docket No. 33-88-126

MCDOWELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Patricia Payne, was employed by the McDowell County Board of Education as a school nurse assigned to Bradshaw Junior High School. She filed a grievance on April 29, 1988 alleging her position had been improperly terminated in a reduction of force and she had been misclassified for the purposes of a preferred recall list. A Level II hearing was held May 23, 1988 and the decision at that level was adverse to the grievant. On June 6, 1988 the Board voted to uphold that decision and upon appeal to Level IV the parties indicated a decision could be made on the record developed at lower levels.

The facts giving rise to the grievance are essentially undisputed. The grievant is a Licensed Practical Nurse (LPN) and has been employed as a school nurse by the McDowell County Board of Education for approximately eleven (11) years. In 1986 changes made in W.Va. Code, 18-5-22 required any person employed as a school nurse to be a registered professional nurse.¹ During the 1987-88 school term grievant performed the same duties as she had in previous years but for that year had been categorized as an Aide II in reports submitted to the West Virginia Department of Education for the purpose of obtaining state funding for her position. Grievant was not immediately informed of this report and she did not sign a new contract reflecting any change in her employment status.² No official action was taken by the Board approving any such change and it was apparently made by

¹The pertinent part of W.Va. Code, 18-5-22 provides:

Any person employed as a school nurse shall be a registered professional nurse properly licensed by the West Virginia Board of Examiners for registered professional nurses in accordance with article seven, chapter thirty of this Code.

²Grievant discovered she had been listed as an Aide II in the spring of 1988 at about the same time the Board initiated its reduction in force. (T.7)

the Superintendent of Schools, Kenneth Roberts. By letter dated March 1, 1988 grievant was informed that Mr. Roberts would not recommend to the Board that her contract be renewed for the 1988-89 school term (Board's Exhibit No.3). The reason given for the recommendation was the elimination of the LPN program in McDowell County. Ms. Payne was granted a hearing on the proposal and was informed by letter dated April 8, 1988 that the Board had voted on March 31, 1988 to terminate her employment.

Grievant contends there was no lack of need for her services as the Board is mandated to provide the same health care services to students during the 1988-89 school term as it did during the 1987-88 term. She requests reinstatement to her former position as relief and in the alternative asks that her name be placed on the preferred recall list for aides since she is qualified for that position and has been categorized as such for one year. The Board's position is rather ambiguous as it cites as the reason for grievant's termination the decline in student enrollment in McDowell County and at that same time points to the provisions of W.Va. Code, 18A-5-22 as the cause. Mr. Roberts testified at the Level II hearing that at the beginning of the 1987-88 school term he realized the West Virginia Department of Education would reject grievant's position for funding if she was placed on the list of certified professional personnel since she was an LPN. He submitted her name as an aide on the service personnel list since the salary of a school nurse generally coincided with

the salary of that position. (T.18,19) He conceded this action was not approved by the Board but contended it did not change grievant's classification as she still performed the duties of a school nurse during the 1987-88 school term.

Regardless of the Board's characterization of its actions as a reduction in force due to lack of need and the grievant's assertions concerning the necessity of school health services, the termination was clearly the result of legislation prohibiting the use of LPNs as school nurses. The prohibition was effective July 1, 1986 and the Board was under a duty to take action to conform at the beginning of the 1986-87 school term. It appears the West Virginia Department of Education at that time was promulgating some rules and regulations which purported to allow the use of LPNs in the county school systems as long as they were supervised by an RN.³ The Board may have reasonably concluded LPNs could in some fashion serve in the delivery system for student health services and delayed termination of grievant's position until the 1987-88 school term. The propriety of the

³These regulations were accompanied by several memoranda from the State Superintendent of Schools indicating LPNs could work within the health care system but it is not quite clear in just what capacity they could serve.

Board's action of listing the grievant as an aide on its certification list may be questionable but it had the effect of continuing her employment for another year and it cannot reasonably be concluded that the action constituted a change in classification.

W.Va. Code, 18A-4-8 defines the various aide positions as:

"Aide I" means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide.

"Aide II" means those personnel referred to in the "Aide I" classification who have completed a training program approved by the state board of education, or who hold a high school diploma or have received a general educational development certificate. Only personnel classified in an Aide II class title shall be employed as an aide in any special education program.

"Aide III" means those personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and have completed six semester hours of college credit at an institution of higher education or are employed as an aide in a special education program and have one year's experience as an aide in special education.

"Aide IV" means personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit.

Grievant does not assert she was performing any of the duties and responsibilities of any of these positions during the 1987-88 school term and does not seriously contend her experience as a school nurse qualifies her to be an aide. Grievant's request that she be placed on the preferred recall list for aides is generally a request for equitable relief based on the Board's advantageous placement of her position under that classification on their certification lists. There is, however, no legal obligation for the Board to do so and grievant has not shown the action has resulted in any injury which would require the application of an equitable remedy.

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

FINDINGS OF FACT

1. Grievant, Patricia Payne, is a Licensed Practical Nurse and was employed by the McDowell County Board of Education as a school nurse for approximately eleven (11) years.

2. By letter dated March 1, 1988 grievant was informed Superintendent of Schools J. Kenneth Roberts would recommend to the Board that her position be terminated due to the elimination of the LPN program in the county.

3. Grievant requested and received a hearing before the Board on Mr. Roberts' recommendation.

4. By letter dated April 8, 1988 grievant was informed the Board voted on March 31, 1988 to terminate her employment effective at the end of the 1987-88 school term because of the elimination of the LPN program in the county.

CONCLUSIONS OF LAW

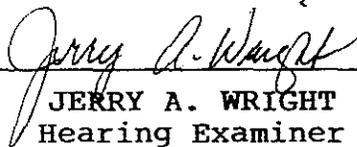
1. Amendments made to W.Va. Code, 18-5-22 effective July 1, 1986 prohibited county boards of education from hiring Licensed Practical Nurses for the positions of school nurses and the action taken by the McDowell County Board of Education to terminate the grievant's employment was the result of said amendments.

2. Grievant's termination complied with the requirements of W.Va. Code, 18A-2-6 that she be given notice of the recommendation with a list of reasons therefor and a right to a hearing before the Board on the recommendation.

3. The categorization of grievant's position as aide on the McDowell County Board of Education's certificate lists for the 1987-88 school term did not operate to change the duties and responsibilities of her job and was not a reclassification requiring placement on a preferred recall list for aides.

Accordingly, the grievance is **DENIED**.

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



JERRY A. WRIGHT
Hearing Examiner

Dated: September 15, 1984