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RODNEY WALLBROWN
and GARY WALBROWN

v.

DOCKET NO. 26-87-120-1

MASON COUNTY BOARD OF EDUCATION

DECISION

Grievants, Rodney Wallbrown and Gary Walbrown, were employed by the Mason County Board of Education as 240 day vocational/agricultural (vo-ag) instructors and filed a grievance after their contracts were terminated and reissued as 230 day employment terms. An evidentiary hearing was conducted by the Education Employees Grievance Board on September 14, 1987 and the grievance was submitted to the hearing examiner on the evidence presented at the level four hearing, the transcript of the evidence presented at the hearing conducted by the Mason County Board of Education on March 27, 1987, (hereinafter referred to as T.____), and the proposed findings of fact and conclusions of law submitted by the parties.

On March 7, 1987 superintendent of schools Barker was notified by the county assessor of the assessed property valuation in the

county, which valuation determines the amount of monies available to the school system as local funds. (T.10). The figures revealed a \$327,000.00 loss in local revenue and were relevant to the proposed budget which was required to be submitted to the West Virginia Department of Education and the West Virginia Tax Department for approval, due by March 31, 1987 for the 1987/88 budget (T.11). Accordingly, superintendent Barker prepared a reorganizational system to deal with the revenue shortfall and by letter dated March 12, 1987 notified grievants of the intent to terminate their contracts in order to adjust their employment time and salary; that the proposed action would not change their position of assignment but would reduce the number of days worked from 240 to 230.¹ The letter continued:

[T]he cause of the pending recommendation to reduce the number of days worked is a loss of assessed valuation in Mason County of \$17,405,883. or \$327,902. in actual local receipts. Due to this loss of revenue measures must be taken to provide methods of cutting expenses in order to balance the budget. The reduction in the number of days employed will save approximately \$25,000.

Pursuant to W.Va. Code, 18A-2-2 you are entitled to a hearing before termination action is taken by the Board of Education. A hearing, if requested, will be held on March 26, 1987, at 6:30 p.m. at the Mason County Board of Education. In the event that time is not available on March 26, 1987, an alternate date of March 27, 1987 or March 30, 1987 may be established. (Grievants' Exhibit 1).

¹ Mr. George Miller, director of finance and treasurer of Mason County Schools, testified that the assessed valuation had gone from 321 million dollars to 289 million in the past three years, which translated to the loss of \$327,000.00 in local taxes (T.34) but that fixed expenses geared to salaries had been on the rise. (T.35). In addition to the \$327,000.00 loss, the (footnote continued)

At a school board meeting on March 18, 1987 the board approved a recommendation of superintendent Barker to abolish the County Policy relating to paid vacation and to reduce all personnel, professional and service, employed for 261 days to 246 days of employment by, in effect, eliminating the paid vacation of these employees and to similarly reduce all personnel employed for 240 days to 230 days of employment; the recommendations were based upon the continued loss of local revenue and were approved by unanimous vote of the board. (Grievants' Exhibit 4, page 6).² By memorandum dated March 19, 1987 grievants were advised of the action of the board in approving the recommendation to reduce the employment terms of all 240 day employees to 230 days. (Grievants' Exhibit 2).

The school board commenced conducting hearings on the proposed termination of contracts on March 25 and grievants had their hearing

(footnote continued)

school board had also lost the benefit of \$542,000.00 of Step 7 funds and there was a need to cut \$811,000.00 to balance the budget. (T.40,41). He was one of the 261 day employees cut to 246 days (T.35) and was not aware of any other way to address the shortfall except that proposed by superintendent Barker. (T.35,36).

² The minutes reflect that abolishing the 15 day paid vacations for 261 day employees would save \$50,000.00 and the reduction of 240 days to 230 days would save the county approximately \$25,000.00.

before the board on March 27, 1987.³ At this hearing superintendent Barker testified that the basis of his reorganization plan was the loss of the \$327,000.00 in actual receipts, which necessitated adoption of a method of cutting expenses to balance the budget (T.18). He had considered various other alternatives, such as reduction in force of staff personnel, but considered that to be the last measure to be taken due to the lack of planning time and also his desire to seek a solution which would avoid layoffs. Most of the money for extended employment time is paid via county supplements and in the instant grievance the extra forty days paid to grievants was paid directly from county funds, as was the \$720.00 supplements grievants were paid for the vo-ag program. (T.22). He also concluded that the 200 day employees within the system were currently at state minimum and to reduce the supplement county-wide and apply it to those 200 day teachers would result in a failure to meet the minimum salary schedule required by law. (T.23).

³ Superintendent Barker had notified grievants of their hearing by letter dated March 23, 1987 on the termination of their contract as per W.Va. Code, 18A-2-2. (Grievants' Exhibit 3). That section provides that the continuing contract of a teacher shall remain in full force and effect except as modified by mutual consent, resignation or termination by a majority vote of the full membership of the school board before April 1 of the then current year, after notice of the cause(s) and an opportunity to be heard at a meeting of the board prior to the board's action thereon.

He stated that in making his recommendation he had followed W.Va. Code, 18-9B-8, which provides a procedure to follow in preparation of a budget that contemplates cutting work days from the school schedule.⁴ His decision to restrict the reduction of days to 261 day and 240 day employees was based upon his professional judgment that positions below those number of days could not be reduced and still get the job done. (T.29,30). With all of the information he had available and within the time constraints superintendent Barker had proposed what he believed to be the most fair and equitable manner of allocating the loss of revenue to employees without layoffs. (T.21).

Grievants presented the testimony of John Bennett, a vo-ag teacher at Gilmer High School and president of the West Virginia VoAg Teachers Association, who testified that the vo-ag program was entwined with the Future Farmers of America (FFA) program and the extended summer program was the strength of the vo-ag program;

⁴ In Summers County Education Association v. Summers County Board of Education, No. 17625, decided by the Supreme Court on November 17, 1987 the Court stated that this section did not apply unless the Board of Finance found that the proposed budget for a county would not maintain the schools for the employment term.

The Court also noted that the Summers County Board of Education, like the boards of education in virtually every county in the State, has had to make difficult budget decisions in the wake of rising costs and declining revenues; that although the Court sympathized with the plight of underpaid teachers the board of education had violated no statutory or constitutional duty by discontinuing county salary supplements after defeat of special levy referenda in February and April, 1982.

that if they were weakened it would have a detrimental effect on the Mason County vo-ag program⁵ (T.43,45).

Grievant Rodney Wallbrown testified that he had been teaching vo-ag in Mason County for fifteen years and the program there was composed of five instructors, who taught and worked with 220 regular students, over 300 prevocational students and over 75 adults. They taught agriculture and its related skills during the school day and adult classes at night, offered a youth and adult farmer class second to none, an adult class in greenhouse production and even a special topics class to adults in small engine repair (T.46, 47). He stated that all of the vo-ag students were required to conduct farming programs, called Supervised Occupational Experience Programs, which were designed to give the students an opportunity to put what they learned in class into practice on the farm. (T.47). He stressed that in order for these programs to be successful they must be supervised by vo-ag teachers and if employment was cut by ten days these instructors would not have time to supervise as they should causing the students

⁵ At level four grievants also submitted letters from Donald L. Michael, state supervisor of vo-ag in the West Virginia Department of Education, which were admitted over objection.

Mr. Michael was of the opinion that a high quality vocational agricultural program could not be operated on less than twelve months of employment by the instructor(s) involved; that the extended employment term of vo-ag teachers was the most important phase of the program as it related to providing instructional supervision relative to students' supervised occupational experience programs and FFA leadership opportunities. (Grievants' Exhibits 6 and 7).

and the students' farming program to suffer.⁶ (T.47,48). Finally, he stressed the economic importance of vo-ag to Mason County as a result of the farming programs, bringing in a gross income of \$820,428.97 and a net profit of \$259,993.84, which was banked locally, as compared to the relative savings realized by cutting ten days from his employment term (T.51,52).

Gary Walbrown offered extensive testimony concerning the FFA, noting that since 1975, when the Mason County Vo/Ag Chapter was organized, the chapter had won many district, state, regional and national awards, i.e., 35 district, 112 state, one regional, 29 national, for a total of 177 awards, (T.53,54).⁷ He outlined the many other honors received by the program and explained the requirements set forth in the Vo/Ag Policy, sections 4100, et seq., which would be violated in the event the terminations were approved by the school board, (T.59-62).⁸

⁶ He contended superintendent Barker had been wrong in concluding that grievants' on-farm instruction time on this program was not an instructional day as defined by Policy 4100; Barker had defined instructional days as those days that were left on noninstructional time between 180 and 200 days (T.24).

⁷ He added that the individual awards which had been won by the students were more important and these awards numbered 386.

⁸ The response to the assertions of Policy violation was that the Policy did not mandate that certain activities occur but that those activities were approved activities to be completed by vo-ag teachers on twelve month employment. (T.78)

The three other vo-ag instructors and their Supervisor also testified at the hearing regarding the impact the reduction of ten days would have upon the program (T.62-73).

At the conclusion of the hearing a motion was made to go into executive session (T.79) after which, in open session, the superintendent made a recommendation that the contracts of grievants be terminated to reflect a change of their employment term from 240 days to 230 days, effective July 1, 1987; the recommendation was made a motion by a board member and carried by a 4-1 vote (T.80).⁹

Grievants contend that W.Va. Code, 18A-2-2 was violated because once the board voted to terminate the first contract at the first hearing on March 25, the decision had been made; that the decision was arbitrary in that it had been already decided the employees whose employment terms would be cut; that State Board of Education Policy 4100 requires that vo-ag teachers be allowed sufficient time to supervise students' occupational experience programs and this contemplates 240 days of extended employment; that the school board violated W.Va. Code, 18-9B-8 by cutting instructional days and that the board violated W.Va. Code, 6-9A-4 by going into

⁹ At this hearing superintendent Barker had been represented by James Colburn, Esquire, and the board of education by Diana Johnson, Esquire, assistant prosecuting attorney of Mason County. At the level four hearing, in response to the assertion by grievants that the board had violated W.Va. Code, 6-9A-4, the Sunshine law, by going into executive session, it was represented to the hearing examiner that no decision on the recommendation to terminate contracts was made by the board while in executive session and Ms. Johnson had discussed the legal questions involved with the board; that neither superintendent Barker nor Mr. Colburn were present in the room while the board was in executive session. See, Appalachian Power Company, v. Public Service Commission, 253 S.E.2d 377 (W.Va. 1979). See also, W.Va. Code, 6-9A-6 which provides that the circuit court in the county where the public body meets has jurisdiction to enforce this Article and may order any action taken in violation of this Article void or enjoin same.

executive session.¹⁰

Counsel for the school board contends that the board of education properly terminated the contracts of grievants pursuant to W.Va. Code, 18A-2-2 due to the financial losses suffered by the school board; that the provisions of W.Va. Code, 18-9B-8 were followed by the school board in making the reductions and that the board did not violate W.Va. Code, 6-9A-4 by conducting an executive session during the grievants' hearing inasmuch as no decision was made therein, neither the employees nor the administration were permitted to be present during the executive session and the actual vote on termination took place in open session with both parties present.

In addition to the foregoing factual recitation the following specific findings of fact are pertinent.

¹⁰ Grievants assert that their grievances are identical to the grievance of Becky Wood, et al. v. Mason County Board of Education, Docket No. 26-87-095 et seq, decided by hearing examiner Sue Keller on September 8, 1987. The decision did make a factual finding that the thirteen employees there had been denied a meaningful hearing as required by W.Va. Code, 18A-2-2 inasmuch as the decision regarding their employment had been effectively made. Significantly, however, that decision did not reach the merits of the case and since the issuance of that decision, two decisions have been issued upholding the procedure utilized herein by examining the merits of the reasons asserted by the grievants as to why their respective terms should not be cut. See, Roach v. Mason County Board of Education, Docket No. 26-87-070 and Sommer v. Mason County Board of Education, Docket No. 26-87-121. Both of these decisions contained a finding that the action of the board had not been arbitrary and that the action had been taken for good cause, i.e., the loss of revenues. Cf. Jones v. Ritchie County Board of Education, 359 S.E.2d 606 (W.Va., 1987); Bates v. Mineral County Board of Education, 133 W.Va. 225, 55 S.E.2d 777 (1949).

FINDINGS OF FACT

1. Grievants were employed by the Mason County Board of Education as 240 day vocational/agricultural instructors and were notified by superintendent Barker on March 12, 1987 of the intent to terminate their contracts in order to adjust their employment time and salary by reducing the number of days worked from 240 to 230. Grievants were informed of their right to a hearing before termination action was taken by the school board.

2. The reason for the action was a loss of assessed valuation in Mason County of \$17,405,883.00 caused primarily by a plant closure and a resulting loss of \$327,902.00 in actual local school receipts. Superintendent Barker had learned of the shortfall on March 7, 1987 from the county assessor and had prepared a reorganizational system in response thereto.

3. Part of the reorganization involved an across-the-board abolishment of the county policy of paid vacation and to reduce all personnel, professional and service, employed for 261 days to 246 days and to likewise reduce all personnel employed for 240 days to 230 days of extended employment, extended employment being defined as days beyond the normal 200 work days.

4. On March 18, 1987 the school board approved the recommendation of superintendent Barker as set out above as a general plan

of coping with the financial dilemma and all affected employees were notified by memorandum dated March 19, 1987. However, no action was taken on termination of individual employment contracts at this time.

5. On March 23, 1987 superintendent Barker notified grievants that their hearing, as required by W.Va. Code, 18A-2-2 on the termination of their contract, would be held on March 27, 1987 by the school board. Section 2 provides that the continuing contract of a teacher shall remain in full force and effect until, in this case, it is terminated by a majority vote of the full membership of the school board before April of the then current year, after notice of the cause for termination and an opportunity to be heard.

6. At the hearing on March 27, 1987 superintendent Barker testified in detail about the financial situation of the school system and his efforts to respond thereto. The evidence preponderates in favor of a finding that he complied with the provisions of W.Va. Code, 18-9B-8 in the budget reductions and that the reorganization plan was not based upon arbitrary or capricious considerations. Within the limited time frame he had to operate and consistent with his desire to avoid a layoff as a possible solution, the plan as presented by superintendent Barker was fair and equitable.

7. At this hearing grievants were also given the opportunity to present evidence of the outstanding vo-ag program which they had helped establish in Mason County and the effect the reduction

of the ten days work time would have thereon, especially the summer farming program, the Supervised Occupational Experience Program. While it is apparent the vo-ag program will be affected as a result of the reduction of employment days to 230, the vo-ag program will survive.

8. At the conclusion of the grievants' hearing the board went into executive session for a short time and upon returning to open session approved the recommendation, in motion form, of the superintendent to terminate the grievants' contract to reflect a change of their employment term from 240 days to 230 days, effective July 1, 1987. While in executive session neither superintendent Barker nor his attorney were permitted access to the board and the board made no decision on the question of termination of contracts. Accordingly, it is found that there was no violation of W.Va. Code, 6-9A-4.

9. Although the Mason County Board of Education on March 18, 1987 approved a general recommendation of the superintendent to abolish paid vacations and to reduce the extended employment terms of 261 day and 240 day professional and service personnel as a potential response to the financial shortfall, no decision was rendered in individual cases and no decision was made to terminate contracts as contemplated by W.Va. Code, 18A-2-2. Over a period of several days the school board conducted numerous hearings for the various groups and individuals affected by the proposed termination of contracts who requested hearings and there is no evidence

to support a finding that the board had made a decision in individual employee cases at the time of that employee's hearing. Admittedly, when the school board voted at the first termination hearing there was a presumption or likelihood that the entire reorganization plan would be approved but it cannot be presumed that the school board ignored the evidence or otherwise acted in bad faith in approving the recommendation of the superintendent to cut employment terms in each succeeding hearing, including grievants' hearing.

10. Any alleged error in the asserted predisposition or arbitrariness of the school board in grievants' hearing before the board and decision making process has been obviated by the full and complete review at level four of the grievance procedure. In this regard this grievance and the grievances of Sommer v. Mason County Board of Education, Docket No. 26-87-121 and Roach v. Mason County Board of Education, Docket No. 26-87-070 are distinguished from the grievance of Becky Wood, et al. v. Mason County Board of Education, Docket No. 26-87-095-1.

CONCLUSIONS OF LAW

1. For good cause shown a county school board may, in accordance with W.Va. Code, 18A-2-2, terminate the contract of a teacher before April 1 of the then current year after the teacher has been given notice and the opportunity to be heard prior to the board's action. Sandra Fain and Cynthia Fazzini v. Harrison County Board of Education, Docket No. 17-87-082-2; A.E. Sommer, Jr. v. Mason County Board of Education, Docket No. 26-87-121-1.

2. In the grievance procedure it is incumbent upon the grievant alleging a violation of W.Va. Code, 18A-2-2 or alleging arbitrariness or other irregularity to prove the assertions by a preponderance of the evidence. Bennett Church v. McDowell County Board of Education, Docket No. 33-87-214; A. E. Sommer, Jr. v. Mason County Board of Education, Docket No. 26-87-121-1; Thomas Roach, et al. v. Mason County Board of Education, Docket No. 26-87-070.

3. Grievants have failed to prove the material allegations of their grievances by a preponderance of the evidence as a matter of law.

The grievances are accordingly Denied.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18A-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.



LEO CATSONIS
Chief Hearing Examiner

Dated: January 6, 1988