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DAVID WOODSON

v.

Docket No. 18-87-229-3

HARRISON COUNTY BOARD OF EDUCATION

D E C I S I O N

David Woodson, grievant, is currently employed as a bus operator, pay level D, by the Harrison County Board of Education. On July 17, 1987 he filed a grievance alleging that the board acted improperly when it induced him to agree to give up his 240 day plumber position, pay level E, effective July 1, 1987 for the 200 day bus operator position he currently holds. The grievance was appealed to level four in September 1987 and was initially set for hearing November 12, 1987 in Clarksburg, West Virginia, but was subsequently continued to November 15, 1987. The parties agreed to an extended briefing schedule: Grievant's initial brief was received January 27, 1988 and the respondent's reply brief was received February 22, 1988; grievant's counsel filed a rebuttal brief March 15, 1988.

At the level four hearing, counsel for the parties tendered the following stipulations regarding personnel actions taken by the board in early and mid-1987 and which form a factual foundation leading to the grievance issues herein:

a. Grievant, a seventeen year employee was originally hired by the board as a Bus Driver effective the 1970-71 school year and continued for fourteen years until the 1984-85 school year when he was employed as a Plumber I on a 240 day contract. He continued in that classification until the end of the 1986-87 year, earning \$21,216 his final year.

b. The board initiated reduction in force (RIF) procedures in the spring of 1987 eliminating a Plumber I position; grievant, being the least senior plumber, was notified of the superintendent's intention to recommend his termination by letter dated March 5 and upon grievant's request, a hearing was scheduled for March 20, 1987. Prior to the hearing, grievant's fourteen years seniority as a bus operator was brought to the superintendent's attention and, also, that there was a vacant bus operator position currently posted. At the March 20 hearing, members of the board, the superintendent and grievant, who appeared with a West Virginia School Service Personnel Association attorney, discussed the possibility of transferring grievant to the vacant bus operator's position and all were in agreement that pursuant to W.Va. Code, 18A-4-8b(b) grievant could be so transferred but in order to avoid conflict with the W.Va. Code, 18A-4-8 "relegation clause,"

the board requested that grievant sign a waiver agreeing to the reduced contract term and wages (from \$21,216 to \$13,820 with proportionate decrease in retirement benefits). After consultation with his attorney, grievant agreed to sign the waiver.

c. Concurrently, the positions of Charles Layton, John White and David Shaw were also terminated by board action on March 20, 1987. Layton was a twelve year employee who had been a Bus Operator from 1975 until 1984 when he was employed as General Maintenance (C), 240 day contract; White was an eight year employee who had been a bus operator from 1980 until 1982 when he was multiclassified as Bus Operator/General Maintenance and in 1984 he was transferred to Electrician I, 240 day contract; Shaw, a three year employee, was employed in 1984 as a Carpenter II (F), 240 day contract. On June 30, 1987 the board rescinded all of the terminations of these men and reinstated them to their former positions and on July 13, 1987 reclassified Layton from General Maintenance, paygrade C to Painter, paygrade E. (The document has been somewhat abbreviated).

According to evidence adduced at the level four hearing, the RIF proceedings in the spring of 1987 included an original plan to terminate numerous teaching positions and 18 service positions, eight and one-half in maintenance. As a result of the RIF hearings of March 20, 1987, Glenna Robinson and Marvin Matthews, who were classified General Maintenance (C), each agreed

to take vacant positions as Custodian III (C); the record is silent as to whether there was a change of their employment days.

Grievant testified that he agreed to take the bus operator job because he was assured that all of the maintenance jobs would be eliminated and he therefore would have no job if he did not accept the bus operator position (T.18-20). As a result of the March 20 action, grievant received a transfer letter and he requested a hearing on the matter, not to protest the transfer, but to present a statement regarding some rumors he had heard that some of the maintenance jobs were to be retained (T.23) and he was assured again by school officials that the terminated positions would not be resumed (T.24). He stated that at least one of the more senior employees, Layton, had said he was promised a job, but grievant saw no problem with that because he (grievant) had a job and he assumed that if Layton was to be given a job it would be in the same manner as he -- transfer to a bus driving opening (T.25). Grievant stated that he would not have agreed to the transfer had he known other terminated (RIF) maintenance employees would be offered their jobs back.

Grievant's counsel contends that the board, by either actual or constructive fraud, obtained grievant's consent to be transferred to a lesser paying job and reduced pension benefits when it misrepresented or failed to fully disclose certain

facts to him, i.e., that it was going to reinstate positions to keep staff employed; that the board has no statutory authority to reinstate employees to positions already terminated by board action; and that the board's action violated grievant's right to equal treatment, non-relegation and due process. He asks for retroactive reinstatement to his former Plumber I position with compensation of salary and pertinent benefits and attorney fees and costs for prosecution of his case at level four.¹

Counsel for the board responds and argues that the board was required to transfer grievant to the bus operator's position, pursuant to W.Va. Code, 18A-4-8(b), and his consent to transfer was not necessary or relevant to the issues of the grievance; that the board did not act fraudulently, either actually or constructively, in gaining grievant's consent nonetheless; that the board can reconsider or rescind any employment actions and decisions it deems advisable in accord with Robert's Rules of Order, revised; and that grievant was not deprived of his due process rights as he was afforded not one but two hearings prior to RIF and transfer actions.

¹ Absent express authority to do so, the West Virginia Education Employees Grievance Board will not make awards of attorney fees or costs at level four.

Grievant appears to be the most senior maintenance personnel who was scheduled for RIF and all of the designated persons were retained in some capacity, however, grievant is the only employee whose salary paygrade was reduced.² The board correctly concludes that it has authority to rescind actions which terminated positions and employees in July 1987, but at the same time it certainly had the power to reconsider grievant's situation and superior seniority with the board and restore his position to him. The evidence in this grievance does not preponderate that the board acted fraudulantly, however, arbitrariness can be found on the part of the board when it did not treat all like employees in a similar manner and while the arbitrariness does not arise from clear intentional acts, the result was the same as if it had.

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

²It is noted that another maintenance employee had been terminated from his supervisory position but the record is silent as to where he was ultimately placed and whether he was subject to a salary cut.

FINDINGS OF FACT

1. Grievant was a 17 year employee assigned in 1984 as a Plumber I assisting a plumber and intermittently performing other maintenance duties such as painting and carpentry and electrical work. He was placed on a RIF list along with several other maintenance employees in the spring of 1987 due to general overstaffing and budgetary reasons (T.101). A school official stated that all the abolished maintenance positions were basically needed (T.102, 122) and the board eventually cut more positions than the State required (T.123).

2. At his RIF hearing grievant agreed to take a bus operator's position, for which he had 14 years seniority, as he had been assured that no maintenance jobs would be restored. At the board's request and upon the advice of an employees' advocacy attorney, he signed an agreement to take the bus driving position for lesser salary, employment days and benefits. Grievant's salary dropped from \$21,216 to \$13,820 with commensurate loss in pension benefits.

3. Grievant did believe that the most senior maintenance employees may be retained for employment in some capacity as several had extended seniority as bus operators, but none were as senior as he, as bus operators or in overall years of seniority. He attended his transfer hearing at a later date and voiced no protest on the official action transferring him to a bus operator's position because he was again assured that no eliminated maintenance jobs would be restored.

4. Other similiarly affected employees agreed to transfers from maintenance to custodial positions and remained in the same salary classification level. (The levels and salaries advance alphabetically from A, B, C, and up). Likewise, some employees did remain on the RIF list for a time but bid into other jobs which did not reduce their salary level and, in fact, Stella Walker advanced from a Clerk (C) to a Bus Operator (D). Three other employees remained on the RIF list and two had several years prior experience as bus operators with overall board employment of 12 and 7 years, respectively; one had only 3 years total seniority, in maintenance.

5. On June 30, 1987 the board rescinded the RIFs of the latter three employees, Charles Layton, John White and David Shaw and restored their positions in maintenance. In July, Layton, who had been paid a painter's salary for some time back, was formally reclassified to the position and 2-step salary level increase, a non-discretionary action it failed to take in 1985 and 1986.

6. The respondent has not satisfied its contention that there was compelling necessity for restoration of the painter, electrical and carpentry positions (T.104-115); one reason it kept the least senioered employee (3 years), Mr. Shaw, a carpenter, was that he was so skilled and valuable "our loss would be someone else's gain." (Grievant Exhibit 7, Board Memo #1-19, July 1, 1987).

7. The evidence preponderates that out of the several general employees in maintenance whose jobs were eliminated and who were on a RIF list, only grievant ended up with a reduced salary level and the board took no steps in June or July 1987 to lessen the impact on him and restore him to either his former salary level or position so that all affected employees were treated in an uniform manner.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to personnel actions affecting school employees but this discretion must be exercised reasonably, in the best interest of the school system and in a manner which is not arbitrary or capricious. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (W.Va. 1980); Miller v. McDowell County Board of Education, Docket No. 33-87-133-1.

2. A board of education has a non-discretionary duty in personnel matters to treat all like employees in the same manner, W.Va. Code, 18A-4-5b, and failure to do so constitutes arbitrariness on its part as a matter of law.

3. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979); Hedrick v. Pendleton County Board of Education, Docket No. 23-86-375-1; Swain v. Berkeley County Board of Education, Docket No. 02-86-167-2.

4. Pursuant to W.Va. Code, 18-29-5(b) the West Virginia Education Employees Grievance Board is vested with the authority to provide relief not inconsistent with regulation or law. Crow v. Marshall County Board of Education, Docket No. 25-87-273-3; Phares v. Randolph County Board of Education, Docket No. 42-86-232-2; Brumfield v. Kanawha County Board of Education, Docket No. 20-86-126-1.

Accordingly, this grievance is GRANTED and the board is ordered to reinstate grievant to his Plumber I position effective July 1987-88 with backpay and benefits.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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:

April 13, 1988

Nedra Koval

NEDRA KOVAL
Hearing Examiner