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TONI BISHOP

v.

Docket No. 11-87-247-3

GILMER COUNTY BOARD OF EDUCATION

D E C I S I O N

Prior to the non-renewal of her probationary contract of employment, the grievant, Toni Bishop, had been employed by the Gilmer County Board of Education as an Early Childhood Education aide. On August 10, 1987 she filed a grievance alleging violation of W.Va. Code, 18A-4-8b and 18A-2-8a in that her release from employment was improper according to employee reduction in force mandates and/or procedurally deficient as the board failed to accord her a timely hearing in compliance with statutory provisions for the non-retention of probationary employees. Upon adverse decisions at levels two and three, grievant appealed to level four and the parties agreed to submit the matter for decision based on the existing record and supplementary briefs submitted by the parties.¹

¹Level two and level three hearings were conducted September 3, 1987 and September 21, 1987, respectively. On December 11, 1987 the board submitted its brief; grievant's brief was received December 21, 1987.

Some underlying facts leading to this dispute are not controverted. Grievant commenced her employment with the board with the 1984-85 school year and was in her third and decisive probationary contract year during the 1986-87 term. In early spring of 1987 school officials identified overstaffing and financial problems which necessitated recommendations for the reduction in force of school personnel. On March 16, 1987 grievant was notified of the then superintendent's proposed recommendation that she be terminated in the RIF actions as she was among the least senior service employees. Her RIF hearing was conducted March 30, 1987 but the board determined that there may have been technical error concerning her release from employment, thus, her name was removed from the RIF list.

Subsequently, by letter dated April 28, 1987 grievant was notified that pursuant to W.Va. Code, 18A-2-8a, she would not be rehired for the 1987-88 school year. In accordance with the provisions of that statute, that a probationary employee may "request a statement of the reasons...and may request a hearing before the board," grievant duly prepared an undated, written request which was received by the board on May 6, 1987. Additionally, the statute requires that the hearing be conducted "within thirty days of the request for hearing."

With respect to the thirty day hearing requirement, the parties have great disagreement. On May 11, 1987 grievant's representative sent two letters to the board regarding the grievant (and some other affected employees). The first letter requested a statement of reasons for non-renewal of grievant's contract and the other requested that he be contacted prior to the scheduling of hearings on the matter. He commented on the county's "dilemma" concerning the "absence" of a superintendent and to his own extremely busy schedule at that time; he suggested that all parties agree upon a hearing date.

Grievant's representative alluded to the fact that the superintendent who had initiated the reduction in force of school personnel in Gilmer County had retired effective June 30, 1987 but had utilized accumulated leave and vacation time and actually ceased his administrative duties several months earlier. The president of the school board claims she responded to grievant's representative by letter dated May 14, 1987 suggesting hearings be set after July 1, 1987 when the new superintendent assumed his duties but grievant's representative claims he never received the letter.

At the level two and three grievance hearings a great deal of testimony by grievant's representative, the school board president and a board secretary amounted to a swearing match in which the ladies claim grievant's representative agreed via

a telephone conversation at some unrecalled date in mid-May to waive a hearing within 30 days and his denial that he agreed to a waiver during multiple telephone conversations regarding all of the RIF and non-renewal actions affecting WVEA members.

The school board president testified that it would have been difficult and near impossible to schedule the hearing without a superintendent and the board's efforts to appoint an interim superintendent failed when other administrative personnel refused to accept the responsibilities under the board's terms. However, the present superintendent did join the school staff as a "General Consultant" in June and by letter dated June 5, 1987 wrote to grievant regarding the reason (lack of funds) for the non-renewal of her contract of employment. There was no mention of an agreed upon extension for the scheduling of the hearing she and her representative had previously requested.²

Subsequently, by letter dated July 13, 1987 grievant's representative wrote the new superintendent complaining of the lack of a hearing scheduled within the prescribed time and inquiring of grievant's employment status. The superintendent scheduled a hearing for August 3, 1987 but grievant refused to attend the hearing and instead filed this grievance.

²If an agreement had been entered into between the parties, to conduct grievant's hearing beyond the 30 day prescribed period and after July 1, 1987, good business and professional practice would demand that despite the chaos and confusion in the school system, a letter memorializing the agreement should have been issued by either the board president or the new superintendent while serving as general consultant.

Grievant now identifies two issues. She argues that her termination of employment was part of a reduction of force action and the board was required to follow the provisions of W.Va. Code, 18A-4-8b.³ In the alternative grievant urges that if W.Va. Code, 18A-2-8a applied, then the board failed to strictly comply with the requirement to grant her a hearing on the non-renewal within 30 days of her request and she is thus entitled to be reinstated to her position as ECE aide with an award of back wages and interest.

The board argues that the oral and written communications between the parties would lead a reasonable person to believe grievant waived her right to a hearing within 30 days. In further support of its position, the board seems to be arguing that under some circumstances, a school board would not be held to strict compliance of notice and hearing provisions regarding personnel matters.⁴

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

³This matter was previously adjudicated by the West Virginia Education Employees Grievance Board, Alltop and Boggs v. Gilmer County Board of Education, Docket Nos. 11-87-154 and 163-3, which determined that a probationary employee does not attain greater rights when the contract non-renewal is based on RIF actions as the employee is not under a continuing contract of employment and W.Va. Code, 18A-4-8a is the proper statute to be applied. Therefore grievant's argument on this issue will not be reached.

⁴The inapposite authority cited by the board, State ex rel. Board of Education v. Casey, 349 S.E.2d 436 (W.Va. 1986), is not applicable as the facts in the instant grievance and Casey are not analogous.

FINDINGS OF FACT

1. Grievant commenced employment as an Early Childhood Education aide with the board of education in 1984. In the spring of 1987, the board was faced with declining student enrollment, diminished revenues and overstaffing of professional and service employees. In response, the board and the then superintendent began implementing measures for widespread reduction in force actions.

2. Grievant was still on probationary employee status and one of the least senior county aides. In March 1987 she was notified of a proposed recommendation that she be terminated in the RIF action. Following her hearing before the board, on the matter, the board declined to act on the recommendation and removed her name from the RIF list due to a belief that a technical error had occurred.

3. On April 28, 1987 grievant was notified that pursuant to W.Va. Code, 18A-2-8a, she would not be rehired for the 1987-88 school year. By letter received at the board May 6, 1987, grievant, on her own behalf, requested a statement of reasons and a hearing before the board; on May 11 her WVEA representative reiterated grievant's requests via two separate letters.

4. Grievant's representative wrote that he understood the dilemma the board faced with an absent superintendent (who was retiring) and that his own schedule would be busy for several weeks. He added that to avoid the need for rescheduling, the parties should agree upon a mutually convenient hearing date. Although grievant's representative claims he did not receive any follow-up written communication from the board on the matter, the board president issued a letter dated May 14, 1987 asking for "your cooperation in allowing us to respond...after July 1. Please advise if your schedule will allow this consideration."

5. Sometime in mid-May there were telephone calls between grievant's representative, the superintendent's executive secretary and the board president regarding hearings for numerous employees affected by RIF actions and non-renewals of probationary contracts. Specific dates and verbatim conversations were not recalled by the parties and the parties disagree as to what was said. On June 5, 1987 the incoming superintendent, acting as consultant until July 1, wrote grievant of the reasons for her non-retention and did not bring up the matter of a hearing date.

6. The record contains conflicting testimony and inconclusive evidence with respect to whether or not grievant's representative agreed in any manner, written or orally, to schedule a hearing on the matter beyond the prescribed 30 day period following the grievant's request for said hearing.

CONCLUSIONS OF LAW

1. A probationary employee not retained for further employment shall be notified of the board's action and, upon the employee's request, conduct a hearing before the board within thirty days of the request showing the reasons for the nonrehiring. W.Va. Code, 18A-2-8a.

2. In the instant grievance the school board did not conduct grievant's hearing upon her non-retention of employment within thirty days of her request and the evidence does not preponderate that she or her agent agreed to a waiver therefrom.

3. School personnel laws are to be strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Accordingly, the grievance is **GRANTED** and the board is Ordered to reinstate grievant to her employment for the 1987-88 school term with back wages less any appropriate set off. Absent express statutory authority to do so, interest may not be awarded.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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: February 4, 1988

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

NEDRA KOVAL
Hearing Examiner