WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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NELLAJEAN BUMGARDNER, ROGER D. MASON,
SANDRA K. MILLIKIN, DAVID R. MOSSOR,
BARBARA BARTZ ROBINSON and DAVID R. WILLIAMS

v. Docket Nos. 89-43-222/223/224/
225/226/227

RITCHIE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, five professional staffers and one service employee of Respondent Ritchie County Board of Education during school year 1988-89, were subject to a reduction-in-force (RIF) of personnel of that system.[1] All but one, teacher Roger Mason, had continuing contracts of employment; Mason was covered by a probationary agreement.[2] On May 24, 1989, they submitted the following complaint at Level IV:

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[1] All Grievants were teachers save David Williams who was a custodian. All six were employed by Respondent prior to 1988-89 as well. One, Barbara Bartz Robinson, had been, as of the Level IV hearing, placed in another position with Respondent for school year 1989-90; however, she still presses this grievance, seeking return to her former job.

[2] Mason expressed concern that classroom teachers or principals not specifically certified in physical education would be teaching the classes to which he was assigned. However, the undersigned takes official notice that persons
(Footnote Continued)

> Grievants' employment was terminated due to a reduction in force in violation of Article 3, Section 10, of the. . .[W.Va. Const.]. Also, the termination was unnecessary, educationally unsound, and in violation of . . .[W.Va. Code], State and local Board of Education policy. A resolution would be to reinstate Grievants to their 1988-89 position with backpay and interest.

Because Grievants were unentitled to benefit of the expedited procedure of W.Va. Code §18A-2-8, and had no other justification for bypassing the lower levels of the education employees grievance procedure, Code §§18-29-1 et seq., their case was remanded to Level II. Bumgardner v. Ritchie Co. Bd. of Educ., Docket No. 89-43-222, etc. (June 12, 1989).[3] Apparently, nothing occurred at Level II, and Respondent conducted a hearing at Level III[4] before issuing

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(Footnote Continued)
qualified in elementary education are generally permitted to provide instruction in all subject areas offered in the primary school curriculum.

Another Grievant, David Mossor, was art teacher at Pennsboro Middle School (grades 5-8) in 1988-89. This facility, unlike a grade school, does not operate on the self-contained classroom concept; however, the art instructor assigned there for 1989-90, while apparently licensed to teach through grade eight, has only general certification generally utilized in a self-contained setting. This scenario gives rise to an interesting question about proper qualification and certification which will have to be squarely addressed should West Virginia counties continue to phase in the middle school system.

[3] In the earlier Bumgardner case, the agreement between Grievants and Respondents to waive Levels II and III was declared unlawful. The waiver of Level I was found appropriate per W.Va. Code §18-29-3(c).

[4] Technically, this was yet another procedural error. W.Va. Code §18-29-4(b) mandates that a hearing shall be held at Level II, if there is authority there to grant the relief requested, see Code §18-29-3(c), while hearing is not
(Footnote Continued)

its decision denying relief. Thereafter, on July 19, 1989, Grievants reinstated their claim at Level IV, where it was heard August 29 in Harrisville, West Virginia.[5] With the Grievants' submission of their fact-law proposals on September 15 and the Grievance Board's receipt of the Level IV transcript on September 25, this matter is ripe for resolution.[6]

On March 28, 1989, Respondent voted to eliminate certain programs[7] and posts effective 1989-90, as recorded in the minutes of that meeting. Gr. Ex. 1. Specifically,

> half-time guidance at Ritchie County High School. . .; half-time French program at Ritchie County High School. . .; librarian programs for Ritchie County High School. . .;

(Footnote Continued)
generally required at Level III per §18-29-4(c). It appears that Superintendent Meador, at Level II, was empowered to recommend that Respondent rescind its personnel action RIF'ing Grievants in this case. Code §18A-2-1. Since further remand would result in unnecessary delay, and since no prejudice to Grievants is perceived, the error will be deemed harmless in this instance.

[5] See WVESEGB Rule 4.14.

[6] Respondent did not submit fact-law proposals by the agreed-to deadline, or thereafter, even though the parties were specifically requested to address certain issues post-hearing. The Level IV record also did not include a transcript of the April 10 RIF hearings, although the undersigned was advised one would be provided upon request.

[7] Grievants' Exhibits 3 and 4 are, respectively, West Virginia Board of Education and Ritchie County Board of Education policies regarding the provision of certain programs for students. As noted by the undersigned at the Level IV hearing, it is not at all clear that Grievants have standing to enforce these policies in this forum, even though Respondent's failure to comport therewith might effectively eliminate their livelihood.

> the physical education position at Smithville and Ellenboro Schools. . .; art programs at Ritchie County High School [and] Pennsboro Middle School. . .; gifted program at Ritchie County High School. . .;
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> . . .
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> [and] four (4) evening custodial positions with related grievance positions. . .,

among others, were terminated. No individual employees were named at that time; however, Ms. Millikin was half-time guidance counselor and half-time French teacher at RCHS; Ms. Bumgardner was RCHS librarian; Mr. Mason taught physical education at Smithville and Ellenboro; Mr. Mossor was responsible for art instruction at Pennsboro Middle School; and Ms. Robinson coordinated art and gifted programs for RCHS. Mr. Williams filled an evening custodial job, at Cairo Primary and Middle Schools.

Under date of March 31, then-Superintendent of Schools F. Dixon Law[8] sent letters to Grievants advising them that Respondent had discovered a need to cut "excess positions," Gr. Ex. 2, and that he would accordingly recommend to Respondent that each of their contracts be terminated. Mr. Law further informed Grievants that they would be "accorded the opportunity for a hearing [on April 10, or at a special meeting]. . .before a final recommendation is made and confirmed by the Board [of Education]." Id.

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[8] Mr. Law retired June 30, 1989, and on July 1, David Meador became Ritchie County's Superintendent.

W.Va. Code §18A-4-8b(a) provides, in pertinent part:

> Whenever a county board [of education] if required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of. . .[Code §18A-2-2]. . ..

Code §18A-2-2 reads:[9]

> The continuing contract of any teacher shall remain in full force and effect. . .unless and until terminated. . .by a majority vote of the full membership of the board [of education] before April first of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board [of education] prior to the board [of education]'s action thereon. . .except. . .school year one thousand nine hundred eighty-eight--eighty-nine only, the board [of education] shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract.

Code §18A-2-8a provides, in part:

> The superintendent at a meeting of the board [of education] on or before the first Monday in May each year shall provide in writing to the board [of education] a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. . . .. Any such probationary teacher or other probationary employee who is not rehired by the board [of education] at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said. . .meeting, of their not having been rehired or not having been recommended for rehiring. Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed

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[9] The emphasis in this excerpt from §18A-2-2 was provided and highlights an addendum to the statute effective upon its February 28, 1989, enactment.

> may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board [of education]. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting. . .called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

Code §18A-2-6 provides, in pertinent part:[10]

> The continuing contract of any. . .[service] employee shall remain in full force and effect. . .unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board [of education] before the first day of April of the then current year. . .except. . .school year one thousand nine hundred eighty-eight--eighty-nine only, the board [of education] shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board [of education], if requested, before final action is taken by the board [of education] upon the termination of such employment.

At Level IV, Grievants' attorney argued that Respondent had not met the procedural requirements of these provisions and identified this failure as the crux of their case.[11] Specifically, he contended that since the positions Grievants occupied had been eliminated on March 28 an effective decision had already been made on the viability of their contracts, rendering any subsequent hearing

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[10] With regard to the underlined portion, see n. 9.

[11] If this is the "crux," it is surprising that it was not mentioned in the statement of grievance. However, Respondent did not object and no prejudice to it is perceived.

meaningless. In support of their point, Grievants rely on Wood v. Mason Co. Bd. of Educ., Docket Nos. 26-87-095-1, etc. (Sept. 8, 1987). In Wood, the county mathematics coordinator, the principal of a certain vocational-technical center, a diagnositican, and the directors of five specified systemwide programs grieved the elimination of their posts for the upcoming school year. The Mason County Board of Education had approved a reorganizational chart excluding the grievants' positions prior to allowing timely hearings on the changes in the circumstances of their employment. It was held in that case, at p. 8, "the evidence supports the conclusion that the board [of education] had already made the decision to terminate prior to conducting hearings for the grievants," for reasons including "there was no question of which specific employees were affected as they were identified by position." Id., p. 4.[12]

The issue is thus presented: to what extent may a county board of education make decisions on proposed reorganizations, including position abolitions and the like,[13] prior to advising potentially affected personnel and allowing them a full and fair hearing on the consequences? It was stipulated by the parties hereto that no Grievant had

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[12] The reader's attention is also invited to Fox v. Summers Co. Bd. of Educ., Docket No. 45-87-185 (Dec. 22, 1987).

[13] See n. 21, infra.

bumping rights over any other of Respondent's employees,[14] and so, persons actually filling the positions eliminated on March 28 were, at least in the six instances represented by Grievants, removed from employment.

The undersigned perceives a basic genetic difference between Wood and the instant case. The grievants in the former were all placed on administrative transfer, not preferred recall pursuant to a RIF, as a result of the adoption of a new system of operations in Mason County.[15] Clearly, with the Wood positions eliminated, each of the employees involved was going to be moved to a new job, i.e., transferred. To not be afforded a hearing prior to the approval of the reorganization clearly operated to deny them

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[14] I.e., none of the professional Grievants had certification in a specialty other than that in which they worked in 1988-89 and in which field a person with less seniority was employed for 1989-90; and, Mr. Williams was without adequate seniority to replace a fellow custodian or other service staff member in another area in which he, Williams, was qualified and had previously worked. See Code §§18A-4-8b(a), 18A-4-8b(b). Some might argue that service personnel have no bumping rights in a RIF situation per §18A-4-8b(b); others would contend the statute specifically provides the same. In light of the disposition herein, the issue need not be addressed.

[15] Apparently, at the time the Mason County Board of Education decided to restructure, it was assured that a corresponding number of similar positions would be vacant the next school term. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436 (W.Va. 1986) ("[W]here no vacancy in a secondary principalship currently exists at the time a county board of education votes to close a particular secondary school, a reduction in force . . . occurs." At 440.).

a meaningful opportunity to challenge their proposed transfers. In this case, positions were eliminated, but that fact, in and of itself, did not mean that these Grievants, who filled targeted positions, would be cut from employment. However, they have agreed that the matter of whether other personnel could have been "bumped" by them was investigated, as it should have been, and the result was that none were found, even as of the date of the Level IV hearing. However, just as the lack of less senior personnel was a "cause," per Code §§18A-2-2 or 18A-2-6, for Grievants' terminations, just as much so was the original jettisoning of posts. Grievants presented quite compelling arguments at Level IV as to why their respective jobs should have been retained in Respondent's structure; these points may not have been considered by Respondent prior to its March 28 abolishment action.[16]

Furthermore, for extant purposes, the distinction noted between Wood and the case at bar is one without a difference. Grievants herein were clearly guaranteed at least a transfer, and possibly termination, of their employment after Respondent's March 28 meeting. In this sense, their rights would have been identical had Respondent characterized the potential personnel action as a transfer instead of

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[16] Some of these were based on West Virginia Board of Education Policy 2510 and Ritchie County's "Equivalence in Instructional Programs" policy. Gr. Ex. 3, 4.

a RIF, as it did. Gr. Ex. 2. In essence, Grievants were entitled to a meaningful hearing prior to any action necessitating a change in their employment assignment or status being approved by Respondent.[17]

It might be argued that Mr. Williams's position, as one of "four evening custodians," was not as clearly identifiable as those of the other Grievants, and that he thus is unentitled to the same protection. Any such contention may be summarily disposed of. One of the grievants in Wood was a diagnostician, and presumably, the Mason County Board of Education employed more than one person in that classification.[18] Whether or not this is true, the crucial factor is that Mr. Williams's contract was affected significantly by Respondent's March 28 decision, prior to his being afforded the chance to contest the same.

Mr. Mason, as a probationary instructor, does not enjoy privileges under Code §§18-1-1 et seq. identical to those of

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[17] This case is readily distinguishable from McCann v. Lincoln Co. Bd. of Educ., Docket No. 22-88-202 (June 12, 1989). McCann, an Assistant Superintendent of Schools, had a set period of employment thereas; furthermore, per W.Va. Code §18-5-32, his service in this capacity could not extend beyond that of the incumbent Superintendent, who retired at the end of McCann's contractual term. Therefore, the abolition of his position, without notice or opportunity for hearing afforded him, was not a transfer or other personnel action giving rise to Code §18A-2-7 protection. Also, see Code §18A-2-1.

[18] The diagnostician position was the only one not identified with more particularity as to location, duties, etc.

the remaining Grievants. For example, Code §18A-2-8a requires that Respondent, upon a nonrehired probationary employee's request, provide a "hearing" only after the decision not to renew has been effected. However, nothing prohibits a county board of education in West Virginia from offering its probationary staff greater rights than those granted by state law. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). Coincidentally, Powell originated in Ritchie County and established that, under then-existing county policy, nonrehired probationary teachers were entitled to know the reasons for their nonretention and to a hearing thereon, even though state law did not require the same.[19] Herein, it was stipulated that all Grievants were sent the same basic letter, Gr. Ex. 2, which cited both Code §§18A-2-8a and 18A-2-2 or 18A-2-6 and advised of the proposed terminations and hearing rights thereon. T. 8. It is apparent therefrom that Ritchie County persists in treating probationary employees as if they had continuing contracts, at least in RIF situations. Accordingly, Mr. Mason was eligible for the same consideration as each of the other Grievants.

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[19] Pertinent provisions of West Virginia education personnel law, e.g., Code §18A-2-8a, have been amended since Powell was handed down in 1977.

It is also noted that West Virginia Board of Education Policy 5300(6)(b) provides that all education personnel are entitled to due process in matters related to the termination of their employment.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants were all employed by Respondent under continuing contracts during 1988-89, except Grievant Mason, who had a probationary contract as a teacher.

2. Programs and posts in which Grievants served during 1988-89 were eliminated by Respondent on March 28, 1989.[20]

3. By letter of March 31, 1989, Grievants were advised by Respondent's Superintendent of Schools that he planned to recommend the termination of their contracts due to these eliminations. They were also told they were entitled to a hearing, upon request, and that such would be held on April 10 or at another announced time.

4. Reduction-in-force hearings were held April 10, and Respondent voted April 18 to terminate Grievants' contracts.

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[20] It is important to note the distinction between restructuring, i.e., the creation and/or elimination of programs or positions, and a RIF, i.e., the termination of employees' contracts. While restructuring might result in a RIF, it is not synonymous therewith. See Casey.

Conclusions of Law

1. W.Va. Code §18A-2-2 requires that a teacher whose continuing contract of employment is in jeopardy for an upcoming school year must be advised of this, and be offered an opportunity for a hearing, all so that final action can be completed by the county board of education before April 1 of the previous term. Farley v. Bd. of Educ. of Mingo Co., 365 S.E.2d 816 (W.Va. 1988). However, for school year 1988-89 only, county boards of education were allowed until the fourth Monday in April to "initiate" such termination.

2. Code §18A-2-6 requires that a service employee whose continuing contract of employment is in jeopardy for an upcoming school year must be advised of this, and be offered an opportunity for a hearing, all so that final action can be completed by the county board of education before April 1 of the previous term. However, for school year 1988-89 only, county boards of education were allowed until the fourth Monday in April to "initiate" such termination.

3. Code §18A-2-8a requires the county superintendent of schools to provide to his or her board of education, at a meeting on or before the first Monday in May, a list of probationary employees recommended for rehiring the following term, and for the board of education to act upon the

recommendation at that meeting, to then notify all employees not rehired, and to thereafter provide them a "hearing" upon request, at which "the reasons for the nonrehiring must be shown."

4. A county board of education in West Virginia may afford its probationary employees rights greater than those given by state law. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). In this case, Respondent granted Mr. Mason rights as a tenured teacher in a RIF situation, even though he was probationary.

5. Respondent technically met the timelines of these statutes with all Grievants; however, by its March 28 action abolishing positions, Respondent deprived Grievants of meaningful hearings on the personnel actions against them, as referenced in the March 31 letters. Hearings on proposed personnel actions must be meaningful and not mere pretext; therefore, a county board of education may not take final action guaranteeing changes in personnel assignments or status without first allowing affected employees the opportunity to be heard and have their point of view actually considered. Wood; accord, Fox v. Summers Co. Bd. of Educ., Docket No. 45-87-185 (Dec. 22, 1987).[21] See also Farley;

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[21] The undersigned can envision a situation, perhaps involving school closings, that might give rise to exceptions to this rule. Suffice it to say that such exceptions, if available at all, would only be allowed in extremely compelling circumstances.

Lavender v. McDowell Co. Bd. of Educ., 327 S.E.2d 691 (W.Va. 1984); Wayne Co. Bd. of Educ. v. Tooley, 276 S.E.2d 826 (W.Va. 1981); Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to **FORTHWITH** reinstate each Grievant to his or her 1988-89 employment assignment, and to immediately provide each Grievant with all appropriate backpay and interest, less any setoff.[22]

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this

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[22] Four of Grievants, who have been involved in past disputes with the board of education, levelled rather vague charges of reprisal against Respondent. Due to the outcome herein, these and other theories only generally espoused by Grievants, see, e.g., statement of case, p. 1, will not be analyzed.

office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

M. DREW CRISLIP
HEARING EXAMINER

DATED: October 6, 1989