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GWEN LUCION, et al.

v. Docket No. 89-33-244

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

Grievants[1] are all school service personnel employed by the McDowell County Board of Education (Board) in various positions and assignments. They initiated a grievance at Level I May 15,

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[1]Judy Crabtree, Patsy Caceamo, Albert Sheets, John Adams, James Rasnake, Earl Muncy, Jerry Lockhart, David Rose, David Gates, James Lawson, Vernal Carrington, Thurman Martin, Jonnie H. Cook, Phyllis Rice, Donal Hastings, Thomas Parish, Grant Thompson, Tom Fanning, Harry Rushbrook, Tommy Brown, Charles White, Emory Zimmerman, Christopher Jennings, Rudolph Marshall, Antonio Mosko, Tevis Marshall, William Powell, Edwin Egleson, Ricky Blevins, Sammy Owens, Lewis Lambert, John Roark, Wayman Lambert, Donald Sizemore, Orban Porterfield, Danny Bridgeman, Edward Hughes, Neil McCall, Nick Parker, James Fowler, Terry Price, Claudette Egleson, Imogene Coleman, Robert Alley, Brenda Wright, Drema Dillon, Dreama Thorn, Shirley Dash, Helen Hunt, Lawrence Rose, Howard Rose, Fred Smith, Michael Fields, Timothy Barker, James Kelly, Glen Shoun and John Wilson.

It should be noted that although the grievance is styled under Gwen Lucion's name, she and Ms. Shirley Hillyer acted as grievants' representatives and were not adversely affected. This fact did not become known to the undersigned until the Level IV hearing had commenced and a change in the style was not deemed necessary.

1989, protesting the Board's decision to reduce their employment terms. The grievance was waived at that level and also at Levels II and III. An appeal to Level IV was made June 9, 1989, where hearing was held September 22, 1989.[2] Proposed findings of fact and conclusions of law were submitted by the grievants on November 13, 1989. The Board declined to present any proposals and relies on legal argument made during the hearing.

There is no dispute over the relevant facts of the case. Grievants all received notice in April 1989[3] that Superintendent of Schools Kenneth Roberts would recommend that their current employment contracts be terminated. Grievants requested and were afforded a hearing before the Board on April 18, 1989.[4] The Board subsequently voted to terminate grievants' contracts and "instate" them to new contracts with reduced employment terms.[5]

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[2]Several scheduled hearings were continued for cause. At a pre-conference hearing held August 21, 1989, the question of the legality of waiver's at the lower levels was addressed and the parties joined in a motion to have the matter heard at Level IV without remand. Because previous Level IV hearings had been continued for valid reasons and the grievants presented questions with ramifications, the undersigned granted the motion.

[3]The actual notices are not part of the record but it is stipulated that they conformed to the requirements of W.Va. Code §18A-2-6. There is also no dispute as to the sufficiency of the reasons given for the recommendation. It is also noted that, for school term 1989-90, the deadlines for such notices were extended due to statutory provisions for early retirement incentives.

[4]The transcript of this hearing was accepted into evidence at the Level IV hearing.

[5]The majority of the grievants had their terms reduced
(Footnote Continued)

Grievants acknowledge the holdings in Fayette County Board of Education v. Hunley, 288 S.E.2d 524 (W.Va. 1982) and Roach, et al. v. Mason County Board of Education, Docket No. 26-87-070 (November 30, 1987) to the effect that a county board of education may reduce the terms of school service employees after compliance with W.Va. Code §18A-2-6. They maintain, however, that the decision in Roach was in error and certain changes in statutory provisions pertaining to the rights of school service employees have implicitly overruled Hunley.[6] The Board contends both decisions are valid and applicable to its actions.

Initially, it must be noted that grievants do not dispute the Board's assertion that declining student enrollment necessitated reductions in its school service personnel force. Their

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(Footnote Continued)
from 261 days to 240 days. Grievant Handy's 220 day term was reduced to 200 days. Grievants Roark, Powell, Dash and Hart had their 261 day terms reduced to 200 days. The record does not reveal the reason for these differences but no allegation of discrimination or other impropriety was raised and, therefore, is not addressed herein.

[6]At both the May 15, 1989 statutory and Level IV hearings, grievants also raised the issue of whether the contract terms of the least senior employees in a particular classification had been reduced in conformity with the holdings in Brewster and Breedlove v. Lincoln County Board of Education, Docket No. 22-87-070 (December 1, 1987). No evidence was offered at either in support of this contention and it is not addressed further herein. It should also be noted that grievants, at Level IV, asserted that, since their contracts were terminated, their positions should have been posted in accordance with W.Va. Code §18A-4-8b(b). Counsel for the grievants, however, represented that no such posting was requested as relief due to the calamitous effects it would have on the McDowell County School system. This representation is accepted as an abandonment of this particular part of the grievance.

argument is essentially a claim that the Board, in such circumstances, was required to terminate a number of employees rather than "modifying" the contracts of all. Grievants find support of this contention in a strict interpretation of W.Va. Code §18A-2-6, which in pertinent part provides:

> The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, 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 before the first day of April of the then current year, or by written resignation of the employee before that date. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

In support of their contention that changes in statutory provisions subsequent to Hunley overrule that decision, grievants cite W.Va. Code §18A-4-8b(b), which provides:

> Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

Presumably, the latter reference is made in an attempt to show that school service employees have acquired rights in a reduction in force which they did not have at the time of pronouncements in Hunley. Regardless of the reason for the

reference, the assertion that the decision is not applicable to grievants' case is not persuasive. The West Virginia Supreme Court of Appeals was rather explicit in the following holding:

> When a county school board seeks to reduce the working hours of a service employee by one-half, the board must comply with the procedures set out in W.Va. Code §18A-2-6.

The decision in Roach merely adhered to this pronouncement. Although not expressly stated therein, Roach also recognized a certain fairness in reducing a number of employees' contracts rather than terminating employees.

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

FINDING OF FACT

1. Grievants, all school service employees, had their employment terms reduced by action of the Board on April 18, 1989. Prior to that action, grievants were afforded the protections of W.Va. Code §18A-2-6.

CONCLUSIONS OF LAW

1. The employment terms of school service personnel can be modified without their consent by terminating the contract with written notice, stating the cause to the employee and otherwise complying with the provisions of W.Va. Code §18A-2-6, thereby supplementing the old contracts with the modified contracts. Fayette County Board of Education v. Hunley, 288 S.E.2d 524 (W.Va. 1982); Winebarger v. McDowell County Board of Education, Docket No. 33-88-169 (December 28, 1988); Marcum v. Wayne County

Board of Education, Docket No. 50-88-167 (November 28, 1988); Brewster and Breedlove v. Lincoln County Board of Education, Docket No. 22-87-081-1 (December 1, 1987); Roach, et al. v. Mason County Board of Education, Docket No. 26-87-070 (November 30, 1987).

2. The McDowell County Board of Education complied with said provisions when the contract terms of the grievants were reduced.

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

Jerry A. Wright

JERRY A. WRIGHT
Chief Hearing Examiner

Dated: December 29, 1989