WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
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JANET EPLING

v. Docket No. 89-03-562

BOONE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Janet Epling, who has been employed by Respondent Boone County Board of Education as Secretary II, Lory-Julian Elementary School for several years, filed the following complaint at Level I on or about August 17, 1989:

> Grievant applied for, in response to a posting, and received a secretarial position at Ashford-Rumble School which was approved by the Boone County Board of Education on March 21, 1989. The Board [of Education] rescinded the awarding of the position to the Grievant on August 15, 1989. Grievant alleges a violation of W.Va. Code §[§] 18A-4-8b(b). . ., 18A-4-15 and Boone County Schools Policy GBJA. Grievant requests instatement to the secretarial position at Ashford-Rumble School.

After denials there and at Level II, both based on a lack of authority to grant the remedy sought, and waiver, under color of authority of Code §18-29-4(c), at Level III, the matter was advanced to Level IV on September 26, 1989, where it was heard November 30, 1989. Not until very shortly before that hearing did the undersigned become aware of the precise procedural posture of this case. Primarily because one witness was already en route from a distance of several

hundred miles, the hearing was conducted; however, since Code §18-29-4(c) waiver was inappropriate in a case of this nature, the matter was thereafter remanded to Level III for consideration. Epling v. Boone Co. Bd. of Educ., Docket No. 89-03-562 (Dec. 14, 1989) ("Epling I").[1] On January 12, 1990, after Level III decision,[2] Grievant returned her case to Level IV for decision on the record below and that of the November 30 hearing.[3] With the submission of the parties' proposed findings of fact and conclusions of law by February 9, the matter is mature for disposition.[4]

As explained in Epling I, Respondent's rescinding of Grievant's Ashford-Rumble appointment was a result of its Level III disposition of another grievance, one filed by Carol Courtney. Ms. Courtney had been an unsuccessful candidate for the Ashford-Rumble job and, at Level III of her case, she was awarded that position.

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[1] The parties were invited to request a transcript of the November 30 hearing for utilization or reference upon remand. Neither took advantage of this offer.

[2] Since there was a hearing at Level II, presumably a full one, see Level II decision, Respondent correctly exercised its Code §18-29-4(c) option to "review the record submitted by the. . .[Superintendent of Schools] and render a decision based on such record."

[3] Grievant had originally asked for another Level IV hearing after remand; however, she, through counsel, amended this request to one for record submission on February 2, 1990.

[4] Respondent has adopted the findings and conclusions contained in its Level III decision as its proposal at Level IV.

Ms. Courtney has been employed at Ashford-Rumble for some time and originally served as a teacher's aide. Due to the long-term illness of the school's incumbent secretary, Joann Thomas, she began assisting in the office in 1984 and was reclassified to Aide III/Secretary II by Respondent in 1986. For all but a few workdays until the end of the 1988-89 term, while Ms. Thomas was on extended sick leave, Ms. Courtney functioned as Ashford-Rumble's full-time secretary and a substitute fulfilled her aide duties. It was Ms. Thomas' retirement that prompted the vacancy notice under which Grievant was hired; when Ms. Courtney's grievance was reviewed at Level III, Respondent determined it had erred in advertising a position that was, in effect, already filled. Grievant was thus retained at Lory-Julian, and she thereafter presented the instant claim at Level I.

Although the Level III decision in this case is not totally devoid of comparison of Grievant to Ms. Courtney, its primary finding of fact is, "Resolving this grievance in favor of the grievant would require that the action of the Board [of Education] in granting Carol Courtney's grievance at Level III be overruled," and its salient conclusion of law, "The Board [of Education]'s Level III decision in the Carol Courtney grievance to award the secretary position at Ashford-Rumble School to Carol Courtney is final and is not subject to collateral attack." Respondent did not approach Grievant's case as a renewed review of the relative entitlement of each woman to the job or otherwise attempt to

reopen Ms. Courtney's case. It is further noted that Grievant was neither party to nor intervenor in Ms. Courtney's grievance and so did not have standing to appeal it.[5] While it is unknown whether Respondent would have allowed Grievant to so join or intervene,[6] there was no assertion that she sought this involvement even though she learned of Ms. Courtney's claim and its substance in late July; had a related conference with Respondent's

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[5] Respondent's implication that Grievant's failure to appeal Ms. Courtney's successful decision is thus not pertinent. See Level III decision, Finding 10.

Respondent's alternative conclusion, that Grievant's case was not timely filed since Ms. Courtney's reclassification to Secretary II occurred in 1986, is likewise inaccurate. Even if Grievant then knew of the reclassification, she had no reason to complain thereof and it in no event would be the "grievable act" giving rise to Grievant's claim. See Gr. Proposed Conc. Law 5, 6.

Although no comment is intended on the correctness of Respondent's Level III decision in Ms. Courtney's case, the parties' attention is invited to Savilla v. Putnam Co. Bd. of Educ., Docket No. 89-40-546 (Dec. 21, 1989), which involved secretarial positions and reclassification in a somewhat different context.

[6] Respondent opined it might have indeed been prevented from allowing such involvement due to Code §18-29-3(r) (all grievance "forms and reports," presumably including hearing transcripts, "shall remain confidential except by mutual written agreement of the parties"), at least without Ms. Courtney's permission. As late as November 30, 1989, such was not forthcoming.

Aside from a brief remark made by Grievant's counsel on November 30, in reply to Respondent's motion to quash a subpoena duces tecum, that his client had no opportunity to participate in Ms. Courtney's grievance "until it was a 'fait accompli'," Grievant posed no contention of due process violation or other impropriety in this regard. Therefore, no comment will be made on the correctness of Respondent's interpretation of §18-29-3(r).

Grievant's opposition to Respondent's quash motion was, in essence, withdrawn.

Superintendent of Schools Manuel Arvon on July 28, to which she was accompanied by an officer of the Boone County School Service Personnel Association; and, as her only immediate response, attended Respondent's August 8 meeting, when Ms. Courtney's case was heard.

Grievant does not, in her fact-law proposals or elsewhere, reply to Respondent's contentions of its decision's procedural finality. Rather, she approaches Respondent's actions at Level III of Ms. Courtney's grievance as if they were an original hiring decision of the board of education. She attacks the revocation of her selection and the affirmation of Ms. Courtney's placement as a circumvention of the Code §18A-4-8b(b) standards for filling service personnel openings.

This case highlights the dichotomy between a county board of education's role as employer on the one hand and grievance evaluator on the other. Both identities are created by statute, see, e.g., Code §§18-5-1 et seq., 18-29-1 et seq. In its capacity as employer, a board of education is obligated to select service personnel "on the basis of seniority, qualifications, and evaluations of past service," as those terms are defined in Code §18A-4-8b(b). See, e.g., Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-20-581 (Nov. 21, 1989). As grievance evaluator, its task is somewhat different; the function is a quasi-judicial one, to review a personnel-related action which has already occurred to determine whether a remedy is due and/or

available.[7] This is obviously a system which contemplates a county board of education, the grievance evaluator, being called upon to review its own actions as employer.[8]

As is true with most adjudicative proceedings, education employee grievances have rather well-defined end points. These are found in the statute, Code §18-29-4, e.g., a grievant failing to appeal a Level III pronouncement to Level IV "within five days of the written [Level III] decision" renders it final. See Code §§18-29-4(c), (d). There is no provision for any other person or entity to contest a grievance decision as exists, for instance, within the parallel state employees grievance procedure, Code §29-6A-7 (West Virginia Division of Personnel may appeal a Level IV disposition even if not a named party at lower planes). The principle, "finality is desirable in the law," has been recognized in administrative proceedings. Harrah v.

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[7] The actions of a county board of education have been held not to be those of an employer in another, although related, context. In Watts v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Apr. 28, 1989), p. 4, it was found that the paying out of "compensation" under a previous Grievance Board decision's order was not payment "as employer to employees."

[8] This is not to say that all quasi-judicial proceedings of a county board of education are removed from its role of employer. For example, a county board has the obligation to conduct hearings on certain proposed personnel actions, see, e.g., Code §18A-2-7, which hearings are outside the confines of the grievance procedure. See also State ex rel. Rogers v. Bd. of Educ. of Lewis Co., 125 W.Va. 579, 589-90, 25 S.E.2d 537, 542 (1943) (board of education to act as quasi-judicial entity in Superintendent's hearing on dismissal charges).

Richardson, 446 F.2d 1 (4th Cir. 1971) (noting applicability of res judicata); Liller v. W.Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W.Va. 1988). Clearly, a process for reviewing personnel complaints which does not include a time of resolution frustrates its ultimate purpose; as noted, the education employees grievance procedure, Code §§18-29-1 et seq., provides such a "stopping place," as it was designed to. See Code §18-29-1.[9]

A "grievance," as defined in Code §18-29-2(a), must be understood, at least generally, to mean an employee's complaint against the action of his employer only when that action is in the context of the employment relationship and not in that of the grievance procedure.[10] It is recognized that the distinction between a county board of education as employer and as grievance evaluator is somewhat

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[9] It is well-imagined that the stringent timeliness requirements of the procedure, see Code §18-29-4, were promulgated, in part, to further this goal of finality.

Further, in a context different from that of this case, it has been noted that one may not "wait and see" what is the outcome of another's grievance and then file his own grievance based thereon. Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

[10] As a conclusion of law, Grievant, citing Savilla and Steele, proposed, "Actions of a county board of education or its authorized agent which, even though well-intentioned, are in contravention of the law,. . .cannot stand." This statement is true within the grievance procedure only to the extent that the "actions" taken are by the board of education in its role as employer.

artificial;[11] however, those roles are divergent enough in the statutory scheme that the Legislature rather clearly directed their separate maintenance.[12] Code §§18-5-1 et seq., 18-29-1 et seq., and related provisions must be read in pari materia in this regard,[13] and when this is accomplished, the intention of the duality is apparent.[14]

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[11] For example, the authority of the Level III, or board-of-education level, evaluator to grant certain relief is derived from, although not identical to, the statutory power given the board of education as employer. A hypothetical circumstance demonstrating this would be a situation where two professional personnel vie for a job; one is successful; and the other grieves and is awarded the job at Level III. Normally, a board of education can hire professional personnel only upon the recommendation of its county superintendent, see Code §18-4-10(2), but as grievance evaluator, it would seem to have authority to effect placement of the successful applicant whether or not the superintendent participates or even agrees. Furthermore, even this Grievance Board, Level IV, is somewhat constrained by what remedies respondents, as employers, can provide. See Largent v. W.Va. Dept. of Health, Docket Nos. H-88-012/etc. (Sept. 15, 1989).

[12] One evidence of this is the recognition of the importance of the adjudicator's independence, see, e.g., Code §18-29-6 (all hearings are to be conducted "in an impartial manner" to ensure "all parties are accorded procedural and substantive due process"). It might be argued that the employer should designate neutral third parties to act as lower level grievance evaluators instead of attempting to walk the fine line between employer and evaluator itself; however, this certainly is not required by the statute.

[13] "'Statutes which relate to the same subject matter [in this case, education personnel law] should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.'" Courtney v. State Dept. of Health, #19196 (W.Va. Dec. 20, 1989), Syl. 3, quoting Smith v. SWCC, 219 S.E.2d 361 (W.Va. 1975).

[14] Although there is clearly potential for abuse of the system, none is apparent in this situation.

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

FINDINGS OF FACT

1. Grievant applied and was chosen by Respondent for the Secretary III position, Ashford-Rumble School.

2. Carol Courtney, an unsuccessful applicant, filed an employee grievance seeking instatement to the Ashford-Rumble job. At Level III, she was victorious, by decision dated August 15, 1989.

3. Grievant became aware of Ms. Courtney's grievance and had a related conference, for informational purposes, with Respondent's Superintendent of Schools several days prior to Ms. Courtney's Level III hearing. Also, Grievant attended Respondent's August 8 meeting during which that hearing was conducted in private session. There is no evidence that she, at any time, sought to be joined as a party to Ms. Courtney's grievance or to intervene therein in any way.

3. On August 17, 1989, Grievant filed the within case, challenging Respondent's actions as grievance evaluator of Ms. Courtney's case.

4. Respondent has defended, primarily, by claiming Grievant lacks standing to attack its Level III decision. It did not attempt to reopen Ms. Courtney's case or offer to allow Grievant to become a party thereto or intervene therein.

CONCLUSIONS OF LAW

1. The actions of a board of education as employer on the one hand and as grievance evaluator on the other are separate and distinct. See W.Va. Code §§18-5-1 et seq., 18-29-1 et seq.

2. An employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either despite awareness of that grievance and its substance, has no remedy at a higher level of the education employees' grievance procedure, Code §§18-29-1 et seq.[15]

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[15] The undersigned is aware of Frantz & DeVaul v. W.Va. Dept. of Employment Security, Docket Nos. 89-ES-050/186 (July 25, 1989), but finds it distinguishable due to its rather extraordinary circumstances. In that case, brought pursuant to the state employees' grievance procedure, Mr. Frantz asserted his non-selection for a Civil Service position was improper and at Level III he was awarded the relief of reposting. Because he instead desired instatement, he advanced his claim to Level IV; however, as a result of the Level III decision, the employer vacated the appointment of the incumbent, Mr. DeVaul, and removed him from the payroll. Mr. DeVaul filed his own grievance, and although it was based purely on the actions of the West Virginia Department of Employment Security as evaluator of Mr. Frantz' situation, he was allowed to proceed since the claims were closely intertwined and could easily be consolidated and since there was no question as to the viability of Mr. Frantz' grievance.

In another case, Cunningham v. W.Va. Dept. of Public Safety, Docket No. 89-DPS-124, an employee was given leave to pursue reinstatement to her position, which had been

(Footnote Continued)

Accordingly, this grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

M. DREW CRISLIP
Hearing Examiner

Date: February 28, 1990

(Footnote Continued)
awarded to its former incumbent, Ms. X, as part of a negotiated settlement of Ms. X's dismissal grievance. It is noted that Ms. Cunningham was released from work because she would not accept a lateral transfer, and only that proposed transfer and not her termination directly resulted from Ms. X's grievance. Further, Ms. Cunningham was at any rate unsuccessful on the merits because her post did not enjoy state civil service or like protection against transfer or other personnel action.