REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

REON LAMBERT, et al.

v. DOCKET NO. 89-38-143

POCAHONTAS COUNTY BOARD OF EDUCATION

DECISION

Grievants, Reon Lambert, Gary Beverage and Alicia Wayne, were employed as full-time professional personnel by the Pocahontas County Board of Education (Board) during the 1988-89 school year. Separate level four grievance forms were filed by the grievants on April 6 and 7, 1989 in which they each alleged "[m]y continuing contract with the Pocahontas County Board of Education was terminated and I was denied due process protection afforded me under W.Va. Code [§]18A-2-2."[1] The Board subsequently filed a motion to remand the matter to a lower level for first consideration and the grievants concurred for the purpose of curing any

[1]Grievant Richard Thompson (Docket No. 89-38-557), who was also affected by this Board action, withdrew from the grievance prior to the level four hearing because his position was restored.

possible procedural defects. By Order dated June 26, 1989 the matter was remanded to level two for consideration. On September 13, 1989 the Grievance Board received notice that the parties had agreed that the level one supervisor and the level two supervisor were not vested with the authority to reverse the Board's action and, because the Board was not inclined to reverse its decision, consideration was waived at levels one, two and three.[2] A level four hearing was subsequently held on October 17, 1989 and proposed findings of fact and conclusions of law were submitted by December 15, 1989.

The facts of this matter are as follows. During the 1988-89 school year Reon Lambert was assigned as Vocational Director, Alicia Wayne was assigned as a physical education teacher at Marlinton Elementary School and Gary Beverage was assigned as an instructor of electronics at Pocahontas County High School. By memorandum dated June 15, 1988 Superintendent Daniel D. Curry advised all "Persons Addressed," including the grievants, that on April 11, 1988 the Board unanimously approved the following resolution:

> Due to projections in funding for the 1988-89 school year, the Pocahontas County Board of Education must consider a reduction in force by the spring of 1989. The Board shall direct the superintendent to make recommendations as soon as possible regarding possible layoffs. The Board will consider these recommendations and make recommendations of their own. In order for our

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[2]The Board's waiver at level three could reasonably be interpreted as a denial of the grievance.

> employees to have as much time as possible to consider other employment, persons who could be affected by a reduction in force in 1989 will be given notification by June 30, 1988.

The memo continued "Your position could be affected because the list of positions to be considered for elimination in 1989 will include 1/2 Director of Vocational Education."[3] The memo concluded "Our Board has taken a progressive step toward a stable budget and a healthy future. It is unfortunate, yet some positions must go if we are to prepare ourselves for the 21st century."

At a meeting held on June 27, 1988 the Board approved a recommendation made by Superintendent Curry to consider elimination of a total of eight professional and two and one-half service personnel positions effective the 1989-90 school term. The targeted positions included one and one-half physical education positions and one-half each of a welding instructor and Vocational Director positions. The grievants were notified by memo dated June 29, 1988 of the Board's acceptance, for consideration, of a list of positions to be eliminated in 1989 and were again advised that their positions could be affected. By letters dated March 3, 1989 Superintendent Curry notified Grievants Lambert and

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[3]The letters were personalized to the extent that specific positions were cited, thus Mr. Lambert's letter referred to one-half Director of Vocational Education, Mr. Beverage's letter referred to one-half electronics teacher and Ms. Wayne's letter referred to one and one-half physical education teachers.

Wayne of his intention to recommend the elimination of their positions and Grievant Beverage of his intent to recommend that his contract of employment be reduced from 200 full days to 200 half days. The recommendations, to be effective the 1989-90 school year, were stated to be the result of a lack of need. Hearings on the proposed personnel actions were conducted on March 20, 1989 after which the Board voted to accept the Superintendent's recommendations.[4]

The grievants argue that as tenured teachers they have a constitutionally protected property interest in their continuing and uninterrupted employment which requires certain due process protections be afforded them prior to termination. They assert that they were denied these minimal rights in that the notice of the impending personnel actions did not meet constitutional standards, they were denied the opportunity to present testimonial evidence in their own behalf and the Board was not an unbiased tribunal.

Citing Farley v. Board of Education of Mingo County, 365 S.E.2d 816 (W.Va. 1988) and Clarke v. Board of Regents, 279 S.E.2d 169 (W.Va. 1981) which provide that notice must be reasonable and meaningful thereby requiring a specific justification be given for the proposed deprivation of property, the grievants argue that the notice which they

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[4]As a result of this action Ms. Wayne was terminated, Mr. Beverage's position was reduced to half-time and Mr. Lambert was reassigned to a teaching position.

received was inadequate because the stated reason, "lack of need," was too vague and open ended to provide a sufficient basis upon which to prepare an adequate defense. Lack of need, they speculate, could result from de-emphasizing certain programs, declining enrollment or other reasons. The grievants contend that the failure to provide a definitive statement relating to need constituted an inadequate notice of the proposed deprivation of property.

In addition to the lack of specificity, the grievants allege that the notice was flawed because they had been given two different reasons for the elimination of their positions. They note the June 15, 1988 memorandum stated that their positions were being considered for elimination "due to projected funding in the 1988-89 school year" and that lack of need was not stated as a reason for the reduction until the March 3, 1989 letter. The grievants question whether lack of need was the true reason for the action based upon the reason set forth in the June 15, 1988 memorandum and correspondence from then State Superintendent of Schools, Tom McNeel, who advised Superintendent Curry as follows:

> You have asked: Where notice has been given in June, 1988, before amendment of W.Va. Code 18-9A-4 by Senate Bill 14 (effective June 27, 1988) that a reduction in the county's teaching force might be necessary in the spring of 1989 in order to come within the funding level of 55/1000, can a RIF now be carried out? The county board of education has a surplus of ten professionals.
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> The amendment of §18-9A-4 states with respect to professional personnel employed prior to July 1, 1988, and a county's obligation to establish

and maintain the statute's minimum ratios of professional instructional personnel per 1000 students in adjusted enrollment:

> * * * No person employed prior to the first day of July, one thousand nine hundred eighty-eight, shall have their employment terminated because of a reduction in force resulting from the provisions of this section. Reduction in force will be achieved only through attrition and early retirement.
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> No; I don't think that a reduction in a county board of education's teaching force for the purpose of getting to the aforementioned professional instructional personnel ratios can be carried out at any time after June 27, 1988--except in cases of professional instructional personnel employed on or after July 1; 1988. However, this does not prevent a county board of education from "RIFing" someone for lack of need.

The grievants reason that approximately ten professional positions were ultimately eliminated, the number required to meet the 55/1000 ratio, and that virtually the same positions were eliminated in March 1989 for "lack of need" as were considered for elimination in June 1988 "due to projected funding." Since the only factor that changed was the guidance from Dr. McNeel the grievants argue that the circumstances strongly indicate the given reason "lack of need" was merely a pretext used to accomplish a goal otherwise prohibited.

The second violation addressed by the grievants is that the Board had voted to give tentative approval for elimination of the positions in June 1988, prior to the grievants presenting their case, a process condemned by the W.Va. Supreme Court in Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984). The grievants

assert that not only did the Board eliminate virtually the same positions in March 1989 that it voted to consider for elimination in June 1988, but that it had also received a substantial amount of input concerning the elimination of these positions from the superintendent and citizens' groups for a period of eight to nine months prior to the grievants being given an opportunity to present their side of the issue. The grievants argue that under these circumstances the Board could not possibly have conducted detached, independent hearings and in fact the decision to eliminate the positions had already been made, for all intents and purposes, prior to the hearing.

The third due process violation raised by the grievants was the Board's failure to permit them an opportunity to present witnesses on their own behalf. Citing State ex rel. Rogers v. Board of Education of Lewis County, 25 S.E.2d 537 (W.Va. 1943) the grievants assert that a hearing includes "the introduction of evidence, the argument of counsel and the pronouncement of a decree" and by denying them the right to present witnesses on their own behalf, the Board deprived them of a meaningful hearing. In summary, the grievants contend that the foregoing procedural violations of their due process protections invalidate the Board's decisions relating to these personnel actions and they request to be reinstated to those positions which they held prior to the 1989-90 school year.

The Board denies that it committed in any violation of the grievants' due process rights while implementing the reduction in force. In response to the allegation of inadequate notice, the Board asserts that in the present matter the adequacy of notice concerns whether the grievant was provided notice within a reasonable period of time, as in Farley v. Board of Education of Mingo County, rather than the adequacy of detail. The Board also notes that while the grievants' response to its Motion for a More Definite Statement contained certain specific denials of due process, the adequacy and detail of notice couched in terms of "lack of need" was not included. Regarding the charge that it was not an unbiased tribunal, the Board asserts that an ongoing assessment of need and personnel did not preclude it from properly considering a recommendation for a reduction in force. Addressing the final charge, the Board asserts that, while witnesses were not permitted, none of the grievants were denied the opportunity to present evidence on their own behalf, that Grievants Lambert and Wayne indicated that they had no witnesses other than themselves and that any witnesses present on behalf of Grievant Beverage were not called to testify by his representative and were not identified for purposes of the record.

Evaluation of the evidence leads to the conclusion that the positions held by the grievants were eliminated as a result of the Board's inability to compensate those employees in excess of the 55/1000 level provided by the state,

rather than for lack of need. While the Board apparently did hear evidence regarding need, it was not the primary motivating factor leading to the recommended elimination of the positions. In addition to the March 3, 1988 letters to the grievants identifying "projections in funding" as the cause for considering a reduction in force and the letter from State Superintendent McNeel advising against a reduction for the purpose of achieving state-funded personnel ratios, the testimony of Superintendent Curry at level four is revealing. He explained that it had been the practice of the Board to employ as many personnel as it could afford and that it had retained more than the 55/1000 ratio for many years. After receiving the response from Superintendent McNeel and in consideration of all factors including enrollment, finances, etc., Superintendent Curry testified that he made the recommendation for position eliminations based upon a genuine lack of need for the personnel.

From this explanation it appears that Pocahontas County, like many other counties, had in the past hired more than the state-required minimum number of teachers in an effort to provide a more diverse and complete education for its students. Whether or not the additional employees were "needed" is a relevant determination. While evidence was apparently produced to establish a "lack of need" for the grievants' positions, the previously-discussed letters to the grievants and from Superintendent McNeel plus the fact that the positions eliminated for lack of need were

virtually the same positions originally listed for consideration due to projections in funding, lead to the conclusion that the recommendation was prompted by finances rather than need.

It is well-established in West Virginia that tenured school employees have a property interest in their continued uninterrupted employment which requires employers to provide certain procedural due process safeguards prior to depriving the employees of that interest. Clarke; North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977); Beverlin v. Board of Education of Lewis County, 216 S.E.2d 554 (W.Va. 1975); Knauff v. Kanawha County Board of Education, Docket No. 20-88-095 (Jan. 10, 1989). These safeguards include a formal notice of the reasons, an adequate opportunity to prepare a rebuttal to those reasons, retained counsel at hearings, the opportunity to confront those persons proposing the reasons, the opportunity to present evidence on their own behalf, an unbiased hearing tribunal, and an adequate record of the proceedings. North at Syl. pt. 3.

The extent to which these safeguards must be afforded an employee to insure an adequate measure of pre-termination due process is flexible and will vary depending upon the particular circumstances of a given case. When employees are entitled to a post-termination administrative hearing employers are not required to provide a full evidentiary pre-termination hearing; however, it is generally held that

the employee is entitled to notice and an opportunity to respond as minimal due process protections. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.E.2d 494, 105 S.Ct. 1487 (1985); Buskirk v. Civil Service Commission of W.Va., 332 S.E.2d 579 (W.Va. 1985); Luzader v. West Virginia University, Docket No. BOR-1-86-345-2 (Apr. 20, 1987). With application of these standards to the facts of the present matter it is clear that the grievants were deprived of the meaningful due process to which they were entitled when the stated reason for their position eliminations was not the true reason for the recommendation thus depriving them of a meaningful opportunity to respond.

Application of the Court's reasoning in Buskirk reveals the allegation that the grievants' due process rights were violated when they were denied the opportunity to present testimonial evidence on their own behalf, to be less meritorious. The evidence shows that the grievants themselves were allowed to testify but they were not permitted to call additional witnesses on their behalf. By testifying themselves, with the assistance of a WVEA consultant, they were granted an opportunity to respond to the superintendent's recommendation and to present evidence contrary to his position. This opportunity to respond together with access to a post-elimination grievance procedure would negate the

requirement for the Board to conduct a full evidentiary hearing prior to voting for the position eliminations.[5]

The facts do substantiate the grievants third allegation, that the Board was not an unbiased tribunal at the time it voted to eliminate their positions. In June 1988 the Board voted to consider the elimination of six full-time and nine half-time positions which were designated by title and included one and one-half physical education teachers and one-half each welding and electronics teachers and Vocational Director. In 1989 the Board voted to eliminate virtually the same positions. Minor changes included the elimination of the full position of Vocational Director, rather than reducing it to a half-time position, and retaining a full-time welding teacher.

It is recognized that boards of education must plan for personnel needs well in advance and this would reasonably entail a determination of whether a reduction in force might be necessary. While general planning or voting to eliminate a given number of positions would generally be permissible, the vote to consider specifically identified positions is comparable to the tentative approval process ruled improper by the West Virginia Court of Appeals in Lavender. In that

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[5]Discussion of this issue is limited to the finding that the Board had proceeded in a procedurally correct manner; it does not alter the foregoing conclusion that it was not possible for the grievants to present a persuasive rebuttal when the true reason for the action had not been given.

case the Court held that the tentative approval process, in that case for a transfer, invited prejudgement of the employee's situation before the employee was entitled to present his response and suggested that the Board had heard an ex parte exposition of the superintendent's reasons for requesting the action. This procedure was held to be inconsistent with the concept that the Board is to make a detached and independent evaluation of the employee's case. In the present matter, the Board made a similar prejudgment in March 1988 as to which positions would be eliminated and only confirmed that recommendation, with few changes, in March 1989. Accordingly, the determination had been made prior to the grievants' hearings and the Board could not function as an unbiased tribunal.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Prior to the 1989-90 school term the grievants were employed by the Pocahontas County Board of Education as professional personnel assigned as the Director of Vocational Education (Lambert) an electronics instructor (Beverage) and a physical education instructor (Wayne).

2. In June 1988 the grievants, among others, were advised that their positions were going to be recommended by

the superintendent for elimination effective the 1989-90 school term due to projections in funding.

3. At a meeting held June 27, 1988 the Board approved a list of positions to be considered for elimination including one and one-half physical education and one-half electronics positions and one-half of the Director of Vocational Education position.

4. In March 1989 Superintendent Curry recommended, and the Board approved, the elimination of approximately ten positions including one and one-half physical education teachers, the full position of Director of Vocational Education and one-half of an electronics instructor.

5. The reason given in March 1989 for the recommended eliminations was lack of need.

6. Correspondence from then State Superintendent of Schools Tom McNeel, dated June 15, 1988, advised Superintendent Curry that it was improper to implement a reduction in force in order to bring the number of personnel within the state funding ratio of 55/1000 but such a reduction could be accomplished for "lack of need."

Conclusions of Law

1. Although evidence was produced to establish a lack of need for the positions held by the grievants, the true reason for their elimination was a lack of funding.

2. The basic foundation allowance to the county for professional educators shall not exceed fifty-five professional educators to each one-thousand students in adjusted enrollment. No person employed prior to July 1, 1988 shall have his employment terminated because of a reduction in force resulting from the provisions of this section. Reductions may be achieved only through attrition and early retirement. W.Va. Code § 18-9A-4. Because the reduction in force of the grievants herein was in fact a result of the Board limiting its budget to the funding provided by this statute, the intent of this provision was violated.

3. The failure to provide the grievants with the true reason for the position eliminations deprived them of a meaningful notice and opportunity to respond to the recommendation resulting in a violation of their pre-termination due process rights. Clarke v. West Virginia Board of Regents, 279 S.E.2d 169 (W.Va. 1981); North v. West Virginia Board of Regents, 233 S.E. 2d 411 (W.Va. 1977).

4. The Board's approval of a specific list of positions to be considered for elimination prior to conducting a hearing for the affected employees invited prejudgement on the recommendation and is inconsistent with the concept that the Board is to make a detached and independent evaluation of the employees' cases. Lavender et al. v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984).

Accordingly, the grievance is **GRANTED** and the Board is Ordered to reinstate the grievants to the positions they held during the 1988-89 school term and to compensate them for all wages lost as a result of the improper elimination of their positions.

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

DATED: February 28, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER