THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMI BARRETT AND REBECCA HARVEY,

Grievants,

v. **Docket No. 2019-1521-CONS**

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, Tami Barrett and Rebecca Harvey, are employed by Respondent, Morgan County Board of Education. Each filed a grievance on April 17, 2019. Grievant Barrett filed directly to level three of the grievance process.[1] Grievant Barrett's grievance reads as follows:

> Grievant is regularly employed by Respondent as a service person with the job classification of cook. Grievant was terminated for the 2019-2020 school year due to "financial constraints, the need to realign staff, and the lack of need of certain services." Grievant was released and terminated, although Grievant was not the employee with the least amount of seniority within the job classification, all in violation of W.Va. Code 18A-2-7 and 18A-4-8b. Respondent's actions are unreasonable, arbitrary and capricious.

For relief, Grievant Barrett seeks, "Reinstatement to my position of employment, plus back pay, with interest and all benefits, including seniority."

Grievant Harvey filed a level one grievance, alleging as follows:

> Grievant is regularly employed by Respondent as a service person with the job classification of cook. Grievant was placed on transfer for the 2019-2020 school year due to "financial constraints, the need to realign staff, and the lack of need of certain services." Grievant's transfer was the direct result of Respondent's incorrect decision to terminate a cook

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

> who was not the employee with the least amount of seniority within the job classification, all in violation of W.Va. Code 18A-2-7 and 18A-4-8b. Respondent's actions are unreasonable, arbitrary and capricious.

For relief, Grievant Harvey seeks, "Reinstatement to my position of employment, plus any applicable back pay, with interest and all benefits, including seniority."

The parties requested that the grievances be consolidated and that they proceed directly to level three. An Order of Consolidation was entered on May 3, 2019. A level three hearing was held on August 23, 2019, before the undersigned at the Westover office of the West Virginia Public Employees Grievance Board. Grievants appeared in person and by counsel George B. "Trey" Morrone III, West Virginia School Service Personnel Association. Respondent appeared by its former Human Resources Director, Jamie Harris, and by counsel, Denise M. Spatafore, Dinsmore Shohl, LLP. This matter became mature for decision on October 4, 2019. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant Harvey was employed by Respondent as a half-time cook at Warm Springs Intermediate School (WSIS). Grievant Barrett was employed by Respondent as a half-time cook at Widmyer Elementary School (WES). For the 2019-2020 school year, Respondent eliminated Grievant Harvey's half-time cook position due to budgetary and efficiency reasons. It then reduced in force Grievant Barrett, since she was the least senior half-time cook in the county, and transferred Grievant Harvey to Grievant Barrett's position at WES. Grievants contend that Respondent violated West Virginia Code and Respondent's own policies in not reducing WSIS full-time cook Sharon Roach and converting her position into two half-time cook positions so Grievant Harvey could remain at WSIS as a half-time cook. Grievants failed to prove that Respondent lacked the

discretion under the law and its own policy to retain its full-time cook positions at WSIS rather than convert one into two half-time positions. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants were employed as half-time cooks by Respondent, Morgan County Board of Education, for the 2018-2019 school year.

2. Grievant Harvey was employed as the only half-time cook at Warm Springs Intermediate School (WSIS).

3. Grievant Barrett was employed at Widmyer Elementary School (WES) as the least senior half-time cook in the county.

4. Due to budgetary considerations, Respondent decided to eliminate a half-time cook position in one of its schools for the 2019-2020 school year.

5. Due to efficiency considerations, Respondent chose for elimination Grievant Harvey's half-time cook position at WSIS, dropping the cook positions there from 3.5 to 3.0. (Testimony of Respondent's Former HR Director Jamie Harris and Director of Child Nutrition Angela Beddow & Grievants' Exhibits 12, 5, & 8)

6. Due to Grievant Barrett's status as the least senior half-time cook in the county, Respondent transferred Grievant Harvey to Grievant Barrett's half-time cook position at WES after reducing in force Grievant Barrett for the 2019-2020 school year.

7. Even though Sharon Roach worked at WSIS and had less seniority than Grievants, Respondent did not eliminate her position due to her status as a full-time cook. Further, Respondent chose not to convert Ms. Roach's position into two half-time

positions due to the scheduling and communication problems inherent in having multiple part-time cooks at the same school. (Testimony of Respondent's Former HR Director Jamie Harris and Director of Child Nutrition Angela Beddow)

8. Respondent's Policy 4130 (Assignment and Transfer of Service Personnel) provides, in pertinent part, as follows:

> Service personnel employees who are assigned to schools that require a reduction in the number of employees within a classification shall be recommended for transfer on the basis of seniority. The least senior employee(s) within the classification area shall be recommended for transfer.

(Grievants' Exhibit 4)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievants appear to concede that Respondent had discretion to eliminate a half-time cook position at WSIS for budgetary and efficiency reasons. They contend, however, that Respondent did not have discretion to reduce in force Grievant Barrett and transfer Grievant Harvey from WSIS to WES when there were less-senior full-time cooks at WSIS, such as Ms. Roach. Grievants argue that there is no classification distinction between half-time and full-time positions. Grievants therefore contend that, after eliminating Grievant Harvey's half-time position, Respondent should have reduced in force Ms.

Roach and divided her full-time position into two half-time cook positions. This would have resulted in Grievant Barrett remaining at WES and Grievant Harvey assuming a new half-time position at WSIS.

Respondent counters that caselaw allows it to consider both the seniority and contract terms of employees when implementing a reduction in force, allowing it to reduce a more senior half-time cook over a less senior full-time cook. Respondent further asserts that nothing in State code or caselaw requires that it take into account seniority when transferring an employee. Grievants respond that Respondent's own policy mandates that transfers resulting from a reduction in force must be made on the basis of seniority. Grievants contend that because Respondent has two half-time cooks in some of its other schools, Respondent's failure to create multiple half-time cook positions at WSIS to accommodate Grievant Harvey's seniority was arbitrary and capricious. Respondent counters that it was within its discretion to use only full-time cooks at WSIS due to the increased scheduling and communication problems that accompany having two half-time positions.

Grievants' relief hinges on the premise that Respondent was obligated to convert Ms. Roach's full-time position into two half-time positions to accommodate Grievant Harvey. Grievants support this position by citing the following: "[w]hen implementing a reduction in force, the service person with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. ..." W. VA. CODE § 18A-4-8g(e). In addition, "[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section." W. VA. CODE § 18A-4-8b(h). They further this contention by arguing there is no distinction in seniority between half-time and full-time employees. In

support thereof, they cite the following: “Notwithstanding any provision in this code to the contrary, … each service person is entitled to all service personnel employee rights, privileges and benefits provided under this or any other chapter of this code without regard to the employee’s hours of employment or the methods or sources of compensation.” W. VA. CODE § 18A-4-8(j).

Respondent counters that caselaw supports the proposition that, when implementing reduction in force of service personnel, a board of education may consider contract provisions in addition to seniority when choosing which positions to eliminate. The West Virginia Supreme Court has endorsed an employee’s right, when targeted for reduction in force, to be placed in the position of the least senior employee holding the same contract term. *See Berry v. Kanawha County Bd. of Educ*., 191 W. Va. 422, 446 S.E.2d 510 (1994). Pursuant to this and other rulings, it is appropriate for a board of education, when implementing a reduction in force, to categorize employees by employment term in order to preserve their contract status, rather than simply eliminate the least senior employee in a job classification.

Further, Respondent has discretion to keep a full-time cook position, rather than convert it into two half-time cook positions, when the decision to do so is not arbitrary and capricious. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. " *Dodson v. McDowell County Bd. of Educ*., Docket No. 93-33-243 (Feb. 15, 1994). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered

arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Respondent justifies its refusal to divide a full-time cook position using the scheduling and communication problems inherent in coordinating two part-time cook positions in the same school. While Grievants presented evidence of multiple half-time cooks at some of Respondent's schools, they did not prove that Respondent is required to continue a practice it deems inefficient simply because it is either prohibited from or chooses not to change the practice in a wholesale manner. Grievants failed to prove that Respondent acted unreasonably or that its decision to not maintain half-time cooks at WSIS was arbitrary and capricious.

Grievants contend, regardless of any leeway granted Respondent under State law, that Respondent's own policy directs it to base transfers on seniority. Respondent's Policy 4130 (Assignment and Transfer of Service Personnel) provides, in pertinent part, as follows: "Service personnel employees who are assigned to schools that require a reduction in the number of employees within a classification shall be recommended for transfer on the basis of seniority. The least senior employee(s) within the classification area shall be recommended for transfer." "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell*

v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Thus, Respondent was obligated to abide by its transfer policy.

It is apparent, however, that Respondent's transfer policy simply extends to transfers existing State law mandating that the reduction in force be based on seniority. As previously shown, the West Virginia Supreme Court interpreted these reduction in force laws as endorsing the right of an employee to be placed in the position of the least senior employee holding the same contract term. In extending to transfer situations the same seniority rights applicable to employees in reduction in force scenarios, Respondent's transfer policy implicitly grants Respondent similar leeway to consider an employee's contract provisions when contemplating a transfer.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. When implementing a reduction in force, a board of education may consider employees' contract provisions in addition to their seniority when considering which positions to eliminate. *See, Berry v. Kanawha County Bd. of Educ*., 191 W. Va. 422, 446 S.E.2d 510 (1994).

3. Grievants failed to prove that Respondent's own transfer policy was anything other than an extension to transfer situations of existing State code and caselaw on reduction in force situations.

4. Grievants did not prove that Respondent violated either the law or its own transfer policy, or that it acted in an arbitrary and capricious manner, in transferring Grievant Harvey to Grievant Barrett's half-time position at WES instead of dividing a less senior cook's full-time position at WSIS to accommodate Grievant Harvey.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: November 7, 2019

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Joshua S. Fraenkel
Administrative Law Judge