HAYMOND ROSE

v. Docket No. 93-34-063

NICHOLAS COUNTY BOARD OF EDUCATION

DECISION

The grievant, Haymond Rose, was employed by the Nicholas County Board of Education (Board) as a custodian until the termination of his employment effective the end of the 1990-91 school term. He filed a grievance at Level I protesting that action on August 5, 1991. (See footnote 1) The grievant's supervisor was without authority to address the matter and the grievance was denied at Level II following a hearing held June 17 and December 17, 1992. (See footnote 2) The Board, at Level III, waived consideration of the case and appeal to Level IV was made February 24, 1993. A hearing was heldJuly 2 and September 9, 1993, and the parties submitted extensive briefs in support of their positions by November 8, 1993.

There is essentially no dispute over the facts of the case. The grievant was hired by the Board as a substitute custodian on October 7, 1985. He was issued a contract on that date which reflected his assignment to Nicholas County High School (NCHS) (See footnote 3) and his daily rate of pay. The contract was entitled "Probationary Contract for Employment for Substitute Service Personnel." (See footnote 4) The grievant worked eight days during the 1985-86 school year at NCHS.

On April 7, 1986, the Board approved another probationary substitute contract for the grievant effective the beginning of the 1986-87 school year. He worked thirteen days during that year. On July 1, 1987, the Board approved a probationary substitute contract for the grievant for the 1987-88 school year. On August 7, 1987, the Board posted a vacant Custodian III position at Summersville Elementary School (SES). The grievant, Wilma Underwood, a night shift Custodian I at SES, and three other substitute custodians made applications for the position. Then-SES Principal LowellMorriston recommended to then-Superintendent of Schools Robert Bailey that the grievant be awarded the position.

On or about August 25, 1987, Board member Norma Bush called Principal Morriston and the grievant and advised them that the Board had awarded the position to the grievant. The grievant began working at SES shortly thereafter. The minutes of Board meetings held in calendar year 1987 make no reference to the position or the grievant's appointment.

Ms. Underwood, who was then a ten-year employee of the Board, subsequently voiced strong objection to the grievant's placement in the job and advised Principal Morriston that she would take legal action if she was not given the position. In a discussion with Associate Superintendent James Marsh, Mr. Morriston was advised that, by virtue of her regular employment status and seniority, Ms. Underwood was legally entitled to the job. Mr. Morriston expressed concerns over whether Ms. Underwood could perform some of the more physically demanding tasks required of the day shift position and Mr. Marsh suggested he monitor her performance in the position for one year and if her evaluations were negative other arrangements might be necessary.

On or about September 15, 1987, Mr. Morriston assigned Ms. Underwood to the position and placed the grievant in her former position. The latter was never posted. It is not clear whether Mr. Marsh approved of the grievant's assignment but the record reflects that he was aware of the arrangement soon after it was made. 1987 Board meeting minutes do not contain any reference toeither Ms. Underwood's transfer to the day shift position or the grievant's placement in the night shift job.

Shortly after the beginning of his assignment to SES, the grievant was advised by Sarah Johnson, a secretary in the Board's central office, that he should complete the paperwork necessary for coverage by the Public Employees Insurance Board, a benefit not then afforded substitute employees. The grievant completed the necessary forms and was granted coverage effective October 1, 1987. The grievant was also placed on the regular employee pay scale for Custodian I and given all attendant sick and personal day benefits. In a July 1, 1988 meeting, the Board approved Superintendent Bailey's recommendation that the grievant be awarded a "continuing contract for substitute personnel" effective August 26, 1988. (See footnote 5) The grievant worked in the SES position from August 1987 until the end of the 1990-91 school year. Except for the issuance of the 1988-89 substitute contract and the manner in which he was removed from the position, the grievant was treated as a regular employee during his entire service at SES.

In the spring of 1991 the Nicholas County School Service Personnel Association held a meeting in

which the subject of the grievant's employment status arose. The association determined that he was a substitute employee occupying a position which hadnever been posted. Mr. Marsh was advised that a grievance would be initiated unless the situation was corrected. On or about July 28, 1991, Mr. Marsh advised the grievant that he could no longer hold the post and that it would be advertised as vacant. The job was posted on July 30, 1991 and subsequently awarded to Sue Kincaid, a custodian on an administrative transfer list due to the closure of Kesslers Cross Lanes Elementary School. The grievant remained on the Board's substitute custodian list.

The grievant first maintains that, despite the absence of Board meeting records reflecting his appointment to a regular full time custodian position, Board member Bush's confirmation of his appointment establishes that such action was taken. Alternatively, the grievant asserts that he achieved de facto regular status through the actions and representations of the Board's agents and his detrimental reliance upon those representations. The grievant maintains that those actions "were so egregious" that the Board should be barred from asserting that they were contrary to statute or other authority. Implicit in these assertions is the argument that since he was in his fourth year of employment at SES in 1991, the grievant had achieved continuing contract status which could only be terminated for cause or lack of need and only after providing him sufficient due process.

The Board responds that the minutes of the Board's meetings constitute the best evidence of whether the grievant was ever officially granted regular employee status and those minutes dispute Ms. Bush's assertion that any such action was taken. TheBoard also maintains that to the extent that any Board agent made representations to the grievant that he was a regular employee or took actions consistent with such representations, those promises and actions were unauthorized or ultra vires and not binding on the Board. For the reasons hereinafter discussed, the undersigned concludes that the Board must prevail.

The record does not support that the Board ever took official action to appoint the grievant to a regular custodian position. Three other Board members (See footnote 6) who served during Ms. Bush's tenure testified at Level IV that they had no recollection of any discussion regarding the grievant's appointment to a SES position. To accept that the grievant was officially appointed to the position would be to conclude that they and not Ms. Bush were mistaken and that the Board's Secretary either failed to take note of the action or completely omitted any reference to it in the minutes. (See footnote 7) Further, the record reflects that at each meeting, Board members, including

Ms. Bush, reviewed the minutes of the previous meeting and voted to accept them as accurate or moved that they be amended. There is no record of Ms. Bush ever objecting to any minutes produced for meetings held in 1987 which, as previouslynoted, make no mention of the grievant's appointment. (See footnote 8) Accordingly, it is concluded that Ms. Bush was in error and that the Board never officially granted the grievant regular employment status.

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

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

W.Va. Code §18A-4-15 provides that a county board of education may assign substitutes the following duties:

1. To fill the temporary absence of another service employee.

2. To fill the position of a regular service employee on leave of absence.

3. To perform the service of a service employee who is authorized to be absent from duties without loss of pay.

4. To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position.

5. To fill the vacancy created by a regular employee's suspension.

6.

> To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b [§ 18A-4-8b] of this article.

Clearly, Ms. Underwood's transfer to the SES day shift position created a vacancy in her night shift position. As discussed, there was no posting of the job. It is also apparent that the transfer did not create any of the situations listed in Code §18A-4-15 and that the grievant was not serving at SES pursuant to its provisions. Moreover, neither that statute nor any other provision of W.Va. Code §§18A-1-1 et seq. authorized the Board to bypass the posting and hiring procedures of Code §18A-4-8b and grant him regular status. (See footnote 9) Accordingly, it is concluded that the failure to post the vacancy; the grievant's placement in the position without Board action; and his treatment as a regular employee were violative of Code §18A-4-8b.

The grievant seeks to estop the Board from asserting the illegality of its actions as justification for removing him fromthe position. (See footnote 10) The West Virginia Supreme Court of Appeals has on several occasions addressed the applicability of the doctrine of promissory estoppel to public sector employment relationships. In Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985), the Court recognized the viability of the doctrine in private sector contract actions but declined to find it applicable in situations in which public employees seek to bind a government official to the ultra vires promises or actions of a predecessor. The employees therein, deputy sheriffs, had been promised civil service coverage by a former sheriff but certain statutory requirements for the establishment of the civil service system had not been met when they were discharged. The Court recognized the harshness of a rule which discounted an employee's reliance on the employer's promises but held that the public's interest in its officials' compliance with the law ordinarily outweighs that of the employee.

In Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991) the Court reaffirmed its holdings in Freeman. There, the county board of education granted a school secretary sick leave for years in which she was not an employee of the board of education and then rescinded its action. The Court found that the award of benefits contravened W.Va. Code §18A-4-10 and was therefore an ultra vires act which was not binding on the county board. The Court, as it did in Freeman, also held

that employeesdo not acquire a property interest requiring due process protection by virtue of an illegal action. Applying these principles to the present case, it is clear that the grievant's claim must be rejected.

The failure to post the position in question deprived other service employees of the right to make applications and thwarted the intent of W.Va. Code §18A-4-8b that the most senior qualified employees be given first choice on vacant positions. Further, it is unlikely that had the position been properly posted, the grievant would have received it. Code §18A-4-8b mandates that county boards hire service employees according to their placement on a scale on which substitute employees rank behind regular employees and those whose employment has been discontinued in a reduction-in-force. (See footnote 11) Given the location of the schoolinvolved, it is improbable that no regular employees would have applied for the post. (See footnote 12) Grievant's occupation of the post for four years was a continuous violation of Code §18A-4-8b and an ongoing encroachment of the rights of other service employees to bid upon it. These violations undoubtedly constitute ultra vires actions as that term is used by the Court in Freeman and Parker.

The Court in Freeman acknowledged that a claim of estoppel might be upheld against a governmental body in cases where the public's interest is outweighed by "the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Id. at 422. The Court analyzed the reasonableness of the deputies' reliance on the former sheriff's promises and found it lacking. The same conclusion is reached in the present case.

At Level IV, the only evidence presented by the grievant regarding his reliance on his belief that he had achieved regular employee status was his testimony that during his service at SES, he had declined an offer to return to his previous employment with a mining company at a much higher salary because of that belief. He did not elaborate on the timing of the offer or provide details as to its terms. He also testified that while the document bore his signature, he never received or signed the aforementioned 1988-89 continuing substitute contract.

It is not accepted that the grievant did not sign the contract. It was apparent from his demeanor during his testimony regarding the document and the manner in which he responded to questions during cross-examination on the issue that he was not being forthright. A cursory examination of the signature on the document reveals it to be the same signature affixed to the three previous probationary substitute contracts which the grievant acknowledged signing. Since the contract was

rather crucial evidence on the issue of whether the grievant was placed on notice that he had not achieved regular employee status, his attempt at deception is of considerable significance. Certainly, it is a relevant consideration in assessing his credibility on other points, including his testimony regarding the offer of employment with a mining company. The undersigned finds it doubtful that the grievant rejected an offer to resume working in his previous, considerably higher-paid vocation because he believed he had attained tenure in a custodian position.

It is further determined that by signing the substitute contract and returning it, the grievant was aware that, at the very least, there was a substantial question regarding his employment status and that he should have made some inquiry of the Board's central office about the contract and Board member Bush'srepresentations. Accordingly, it is concluded that to the extent that the grievant actually relied to his detriment on the actions or inaction of the Board's agents, such reliance was unreasonable and insufficient for the application of the limited exception in Freeman to the general rule that ultra vires actions of government officials are not binding.

As previously noted, the grievant also asserts that the actions of the Board's agents were so egregious that the rule should not apply. He relies on Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 422 (1984). Significantly, while our Court alluded to the holdings in that case in Parker, it did not adopt or apply such a standard. Nevertheless, the undersigned has considered the conduct of the Board officials involved and concluded that the statutory violations found herein were errors of omission and neglect and not misconduct.

At Level IV, Assistant Superintendent Marsh asserted that the issue of the grievant's employment status simply "fell through the cracks." The record supports that this was so for at least the initial year of the grievant's assignment to SES. The record also supports, however, that by the end of the 1987-88 school year, Mr. Marsh was fully aware that the grievant had never been given regular employment status by the Board and elected to take no action to remove him from the position simply because Principal Morriston was pleased with his performance and no one was "rockingthe boat." While this conduct is certainly not egregious, it does reflect poor judgment.

Finally, as discussed, an employee obtains a property interest in his or her continued employment by operation of statute and not by virtue of the unauthorized actions of a public officer. Freeman at 418. Thus, at the time of his removal from the position, the grievant was a "misplaced" substitute

custodian and had no right to continuous uninterrupted employment. There is no statute which places restrictions on the removal of a substitute from a particular position, regardless of the length of service of the employee in a particular assignment, and such actions are within the discretion of the county superintendent of schools per W.Va. Code §18A-4-15. Vest v. Nicholas County Bd. of Educ., Docket No. 92-34-020 (May 20, 1992).

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Nicholas 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the
intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: June 29, 1994

Footnote: 1The termination was not for cause and the grievant was, therefore, not eligible for the expedited grievance procedure provided for in W.Va. Code §18A-2-8.

Footnote: 2The parties apparently experienced difficulties in scheduling the Level II hearing. The unavailability of one of the grievant's witnesses necessitated the delay in completing the hearing. The grievant does not assert that the Board unnecessarily delayed the proceedings at the lower levels.

Footnote: 3At the time, the Board apparently designated a "base" school for its substitutes. While the substitute would not work exclusively at this location he would generally be called to work in the area where the school was located.

Footnote: 4It is odd that the Board has adopted a policy, apparently at the direction of the West Virginia Department of Education, by which substitutes are given probationary and continuing contracts of employment. The undersigned is unaware of any statutory authority by which substitutes are designated probationary or tenured. W.Va. Code §18A-2-5 merely requires that the substitute and the county board execute a contract of employment.

Footnote: 5The original contract (Board's Exhibit 6a) bears the grievant's signature. At the Level IV hearing, the grievant confirmed that the document bore his signature but asserted that he had not signed it. He implied that someone had forged the signature. The grievant's credibility on this issue and the import of the contract are discussed infra.

Footnote: 6The members were James Hinkle, Paul Nettles and Charles Hinkle.

Footnote: 7The testimony of the secretary, Louise Legg, establishes that she was very thorough in recording Board actions by shorthand and later reducing her notes to typewritten minutes. It also establishes that her rough drafts of the minutes were reviewed for accuracy by both Superintendent Bailey and Assistant Superintendent Marsh.

Footnote: 8Ms. Bush testified at Level IV that she was very careful to review the minutes of prior meetings and did not hesitate to voice objection if she concluded that there had been an omission of import. She also represented that she had moved for amendments on several occasions.

Footnote: 9W.Va. Code §18A-4-8g, in pertinent part, provides,

> *A substitute school service employee may acquire regular employment status and seniority if said employee receives a position pursuant to [18A-4-15(2) or (5)]. County boards of education shall not be prohibited from providing any benefits of regular employment for substitute employees, but such benefits shall not include regular employee status and seniority.*

Since, as discussed, the grievant was not serving in any of the capacities listed in Code §18A-4-15, these provisions were not applicable. In any event, the statute was not enacted until 1993.

Footnote: 10Despite that the grievant at times intimated that he was released for "ulterior" reasons, the record does not support that the Board terminated his employment for any other cause other than its determination that he occupied his position illegally.

Footnote: 11The statute provides,

> *A county board of education shall make decisions affecting promotion and filing of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.*

. . .

> *Applicants shall be considered in the following order:*
>
> *(1) Regularly employed service personnel;*

(2) *Service personnel whose employment has been discontinued in accordance with this section;*

(3) *Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, andwho apply only for such temporary jobs or positions;*

(4) *Substitute service personnel; and*

(5) *New service personnel.*

Footnote: 12Notice is taken that Summersville is the county seat of Nicholas County and its largest city. The record suggests that since SES is the school system's largest elementary school, it is generally considered a desirable work location.