WILMA MARTIN and EDNA HOLCOMB,

Grievants,

v. DOCKET NO. 94-26-261

MASON COUNTY BOARD OF EDUCATION,

Respondent,

and

DONNA GREENE,

Intervenor.

D E C I S I O N

Wilma Martin and Edna Holcomb (hereinafter "Grievants") have filed the instant grievance, protesting the hiring of Donna Greene into a Cook III, 1/2-time position at Point Pleasant Junior High School. Due to the complex procedural history of this grievance, it will be helpful to include the history with the following findings of fact.

Findings of Fact

1. Grievants are currently employed as regularly-employed cooks by the Respondent. At the time the grievance arose, both had been reduced-in-force and were on a preferred recall list.

2. Donna Greene, Intervenor, is employed as a regularly employed cook/custodian and had been so employed during the 1993-1994 school year. Ms. Greene is employed on a half-time basis as a custodian at Mason Elementary and on a half-time basis as a cook at Point Pleasant Junior High School.

3. In May 1993, Respondent posted position vacancies which occurred after the reduction-in-force. This posting included the subject Cook III, 1/2-time position at Point Pleasant Junior High School. Gr. Ex. 1, Level II.

4. As a result of subsequent transfers among personnel, some vacancies still existed and it was necessary to post another list of position vacancies. Level II Tr., pp,. 46-47.

5. That list was posted on July 8, 1993, which again included the Cook III, 1/2 time position at Point Pleasant Junior High School. Applications were accepted through July 16, 1993. Resp. Ex. I, Level II.

6. Eight applications were received for the Cook III, 1/2 time position at Point Pleasant Junior High School. Seven of the eight applications were from employees who had been reduced-in-force and were on the recall list. Grievants were among those seven who had been previously employed by Respondent as cooks.

7. The eighth applicant, Intervenor Donna Greene, was not on the recall list. Ms. Greene had been previously employed by Respondent in a multi-classified position as described in W. Va. Code § 18A-4-8 and held the classification titles of Custodian and Cook. At the time of her application she had been laid off from her multi-classified Cook position and was regularly employed by Respondent as a half-time custodian. Gr. Ex. 11; see also post-hearing letter to the undersigned from Elizabeth Mattox, Director of Personnel, dated July 27, 1994 outlining Donna Greene's employment history.

8. The Cook III, 1/2-time position was awarded on or about August 9, 1993 to Barbara Scarberry who had been reduced-in-force and was the most senior cook on the recall list. Resp. Ex. 4, Level II; Gr. Ex. 7, Level IV.

9. The Intervenor, Donna Greene, filed a grievance on or about August 18, 1993, contesting the placement of Ms. Scarberry into the cook's vacancy at Point Pleasant Junior High School. A Level II hearing was conducted on August 25, 1993. The Superintendent granted the grievance at Level II and Ms. Greene was notified and placed in the position on August 26, 1993, the first day of school. The formal Level II decision was issued on September 1, 1993. The Superintendent concluded that W. Va. Code § 18A-4-8b required that regularly employed service personnel be considered first for a service personnel vacancy, before consideration is given to an applicant who is on the reduction-in-force recall list. He ordered that Ms. Greene be assigned to fill the "Cook III, 1/2 time" position at Point Pleasant Junior High School. (See footnote 1)

10. Respondent formally implemented the Level II decision and approved the appointment of Ms. Greene to fill the position inquestion on October 5, 1993, retroactive to August 27, 1993. Gr. Ex. 11, Level IV.

11. Grievants, along with Sheryl Sims and Cathy Cook, two other cooks on the recall list, filed a grievance on September 23, 1993, protesting the placement of Intervenor in the 1/2-time cook's position at Point Pleasant Junior High School. That grievance, Docket No. 94-26-117, stated as follows:

> We disagree with the hiring practice of the board by letting an employee with less seniority in our classification have the 1/2-day cooks job at Point Pleasant Junior High School. We feel that this could have been avoided, had these jobs been posted before school was out and we were placed on the R.I.F. list. If the board had not approved the multi-class of this employee then we feel that this situation could have been avoided. We do not feel that it is fair to hold a classification in more than one catagory [sic] of employment.

12. Following a hearing at level two (See footnote 2), the Superintendent denied the grievance on September 30, 1993. He explained in his decision that W. Va. Code § 18A-4-8b requires that a regular employee's application be given priority over those of recall list employees in filling service personnel positions, and as Donna Greene was a regular employee, she should have received the position before any employee on the recall list.

13. The grievants appealed to Level III on October 12, 1993. However, following a meeting with grievants, the Personnel Director and the Superintendent believed that the grievants were satisfiedthat no laws had been violated and had decided to abandon their grievance. Accordingly, no hearing was ever scheduled at Level III.

14. Grievants Martin and Holcomb subsequently appealed to Level IV on March 28, 1994. A hearing was scheduled and Donna Greene was permitted to intervene to protect her interests. However, by letter dated May 27, 1994, the grievants requested that the case be remanded for a hearing at Level III. That request was granted by Judge Brewer on June 1, 1994, at which time that grievance was removed from the Grievance Board's docket.

15. A Level III hearing was held on June 8, 1994, the transcript of which has been made part of the record. The Respondent elected to waive decision at Level III for reasons unknown and Grievants Martin and Holcomb filed the instant grievance at Level IV on June 28, 1994. The grievance is as follows:

> unfair [sic] labor practices. Relief sought is whatever the Grievance Board feels necessary to compensate for lost wages, benefits, sick leave, etc[.] by the mishandling of the grievance due to the Mason County Board of Education lack of response. There was a lot of mental anguish and stress experienced by the grievants. The Mason

> County Board Members did not know of this grievance until it was remanded back by the Grievance Board. They were by-passed at Level III. The Board also failed to answer Level II Grievance in a timely manner. Cheryl Sims is also involved in this grievance. (See footnote 3) Mr. Siders, President of the Board, made the statement that in the 33 years of serving on the Board, that they did not have legal counsel at this level, but legal counsel was there on this night for the Board.

> We would like to see seniority back to original date of hire. Donna Green to go back to custodian job. The job to be reposted (which will effect C. Sims job). (See footnote 4)

16. Grievant Holcomb was recalled to fill a vacancy as Cook III at Hannan High School on October 26, 1993.

17. Grievant Martin was recalled to fill a vacancy as Cook III at Point Pleasant Junior High School on November 23, 1993.

Discussion

Grievants allege that the delay in the mishandling of their first grievance at Level III by Respondent is unethical and caused them "mental anguish and stress." The undersigned agrees that the failure of Respondent to schedule a Level III hearing in the first grievance was unwarranted. The excuse that, because it believed the grievance had no merit, the grievants would abandon the grievance is, in itself, without merit, and this Board cautions Respondent not to make such assumptions in the future.

Nevertheless, W. Va. Code §§ 18-29-1, et seq., the grievance statute for education employees, does not authorize the Grievance Board to enforce, control or act upon any procedural matters outside of level four, especially when, as in this case, the procedural irregularity occurred as part of another grievance. Thus, Grievants' claims of procedural wrongdoing at Level III in the first grievance is not a proper subject to bring before the Grievance Board at this time.

Grievants' claim is basically one of default by Respondent at Level III. However, this Board has held that it does not have any jurisdiction to enforce a default by an employer that occurred at the lower grievance levels or otherwise make any rulings upon a Level IV request or motion by a grievant that an employer should lose by means of a default. See Chaffin v. Wayne County Bd. of Educ.,

Docket No. 92-50-419 (Aug. 20, 1993). Rather, the proper forum for pursuing a default judgment is by filing a writ of mandamus in circuit court, pursuant to W. Va. Code § 18-29-9. Nevertheless, once the grievants requested that the matter be remanded to Level III for a hearing, they reinstated the grievance, and it is probable that they effectively waived any claim of default they may have had. Thus, the undersigned will now proceed with the merits of the case.

Grievants are protesting the placement of Donna Greene into the Cook III, 1/2-time position at Point Pleasant Junior High School without the position being posted, thereby denying them the opportunity to bid on the position. (See footnote 5) There is some argument that Grievants are requesting that Sheryl Sims be instated into the position and that they have no standing to grieve the placement of Sheryl Sims. While the wording of the grievance clearly states that "Cheryl [sic] Sims is also involved in this grievance" and that reposting the position "will effect C. Sims job", it is not soclear that the Grievants are grieving on behalf of Sheryl Sims or, rather, grieving because they would also have had the opportunity to bid on the job. The undersigned assumes, based on the testimony of the Grievants, and their written post-hearing brief, that they are grieving on the basis that the position should have been posted, thus allowing them the opportunity to bid on the job.

Grievants filed their grievance after Donna Green was placed in the Cook III position, challenging her placement in that position. Grievants were not parties to, nor did they intervene, in Donna Greene's grievance challenging the initial selection of Barbara Scarberry for the position. Thus, the Grievants cannot employ the grievance procedure to attack the final decision in the Donna Greene case. See Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991). Finality is desirable in the law, and the Board's placement of Donna Greene into the Cook III position was done in its capacity of a grievance evaluator, not as an employer. Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990). The Board's initial placement of Barbara Scarberry into the position was wrong. The Superintendent recognized the error as a result of the grievance filed by Donna Greene. The Superintendent was acting as a grievance evaluator at Level II, when he sought to correct its earlier error by placing Donna Greene into the position. Grievants cannot now challenge that action.

Finally, even if it were proper to reach the merits given the procedural posture of this case, the decision of the Board to placeDonna Greene in the Cook III, 1/2-time position was in accordance with the law, and the Grievants cannot prevail on their challenge to that action. W. Va. Code § 18A-4-8b

provides, in pertinent part, as follows:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring through 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.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
>
> (4) Substitute service personnel; and
>
> (5) New service personnel.

Further, W. Va. Code § 18A-4-8e provides, in pertinent part, as follows:

> Notwithstanding any provisions in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification.

Donna Greene was qualified for the Cook III, 1/2-time position because she previously held a classification title in that category of employment. She was also entitled to priority consideration over other candidates because, at the time she applied, she was a regularly employed service person, whereas the employment of all the other applicants had been discontinued as part of a reduction in force. See Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994); Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-249 (Sept. 15, 1992). For these reasons, Donna Greene was appropriately appointed to fill the position.

Conclusions of Law

1. The actions of a board of education as employer on one hand and as grievance evaluator on the other are separate and distinct. Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991).

2. An employee cannot successfully grieve a county board of education's actions in reasonably and correctly implementing an earlier grievance decision's order. Gillman, supra.

3. "Qualifications" is defined as holding or having held the classification title of the vacancy. W. Va. Code § 18A-4-8b. Donna Green, a regularly employed custodian at the time of the initial posting, was properly classified as a cook by Respondent on or about July 17, 1989, and remained qualified as a cook at the time of the posting.

4. School service personnel positions must be filled on the basis of seniority, qualifications, and the evaluations of the pastservice of the applicant. Preference in filling said positions must be given to regular employees followed in descending priority by applicants on the preferred recall list, substitutes, and non-employees. W. Va. Code § 18A-4-8b; Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-249 (Sept. 25, 1992).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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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MARY JO ALLEN

Administrative Law Judge

Dated: October 19, 1994

Footnote: 1 *By coincidence, the position was vacant at the time. Barbara Scarberry, the applicant who had been selected by Respondent, had transferred out of the position and had assumed another on or about August 20, 1993. Gr. Ex. 7, Level IV.*

Footnote: 2 *The audio tape of this hearing was lost, as indicated by a letter from Ms. Mattox, dated May 13, 1994, to Administrative Law Judge Lewis G. Brewer. Therefore, no transcript was provided from that hearing.*

Footnote: 3 *Despite the language of this grievance, neither Sheryl Sims nor Cathy Cook participated in the "second" grievance. The correct spelling of Ms. Sims' last name is "Sheryl".*

Footnote: 4 *Hearing was held before the undersigned at Level IV on July 26, 1994. Post-hearing briefs were submitted on or about August 19, 1994, at which time this case became mature for decision.*

Footnote: 5 *The position was not posted after Barbara Scarberry transferred out on August 20, 1993, because the Greene grievance had just been filed on August 18, 1993, and the outcome would affect that position.*