CRAIG M. CLAY,

v. DOCKET NO. 94-29-516

MINGO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Craig M. Clay, grieves his termination by the Mingo County Board of Education ("MCBOE"). He states on his grievance form that "[t]he termination (RIF) letter I received is no longer valid due to the nontransfer of faculty at Riverside Elementary. I wish to remain in my teaching position at Dingess Grade for the 94-95 school term." This grievance was denied at levels I and II and waived by MCBOE at Level III. The grievance was then appealed to Level IV. The parties agreed to submit this case on the record and it became mature for decision on October 6, 1994.

Background

The record in this matter is very limited. Apparently sometime in March 1994, the Grievant received notification (See footnote 1) that he would be RIF'd from his teaching position at Dingess Grade School. He requested a hearing from the MCBOE and this hearing was held on March 29, 1994. At this hearing he was told that the reason he was being RIF'd was because teachers with more senioritywere being transferred from other schools and they would be placed in his position. Also at this hearing, Grievant was told he would be the person with the most seniority on the RIF list. Grievant was hired in 1989 and had five years seniority.

After this hearing, the MCBOE at its April 19, 1994 meeting, voted not to transfer the three elementary teachers from Riverside Elementary ("RE") on the transfer list. These positions were three of those originally scheduled for elimination by Superintendent Conn. The teachers from RE had enough seniority that they would be transferred not RIF'd. MCBOE transferred the other teachers on Superintendent Conn's recommended transfer list. Grievant's representative met several times with the school's administration to request Grievant's name be removed from the RIF list as a result of MCBOE's failure to transfer these teachers. No action was taken. This grievance was then filed.

A Level II hearing was held on May 23, 1994. Grievant testified he was certified in K-8 and was called a "multi-subject teacher" because he taught PE, Art, and Developmental Guidance while other teachers had their planning periods. Both Grievant and Mr. Fullen, Assistant Superintendent, testified that some teachers with the same or less seniority as Grievant were able to keep their positions because they possessed other endorsements. Under cross-examination, Mr. Fullen testified that Grievant's position at Dingess Grade School had not been abolished, posted, or filled for the 1994-1995 school year. The current status of the position is unknown.

Respondent MCBOE did not present any evidence or argument at the Level II hearing. The Level II Decision was nonresponsive to the issues before the grievance evaluator. It stated:

> the Central office Staff made the reductions and transfer [sic] based upon projected enrollments for the 1994-1995 school term. The reductions and transfers [sic] was implemented according to state law. The Grievant was given due process. The employees placed on Transfer and the Reduction in Force List were notified and offered a hearing before the Board. Once the employees had a hearing, the Superintendent presented a list that included Transfers, Reduction in Force to the Board. The Board voted on all except the particular school in question (Riverside). The decision by the Board would override any decision made at this level.
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> This Grievance can be denied based upon due process being offered by the Superintendent and his staff.
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> Therefore, based upon due process procedures, the Administrative Staff provided all rights to the Grievant, this Grievance is denied.

Arguments

Grievant argues his RIF became invalid prior to the end of the school year when the Board voted not to transfer three elementary teachers from Riverside Elementary. He argues the RIF lost its justification and thus, he is entitled to instatement into the position. Grievance Board cases of Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990); Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991); and Hollis v. Wyoming Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1995) were cited to support this reasoning. The Grievant also cited W. Va. Code §18A-4-7a to support his argument. This Code Section states in pertinent part "[t]hat an employee

subject to release shall be employed in any other professional position wheresuch employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure." Id.

Respondent's Proposed Findings of Fact stated Superintendent Conn, by letter dated May 23, 1994, advised the Grievant his grievance was denied as untimely filed. A thorough search of the record does not reveal any such letter, nor does the Level II Decision as stated above, mention the issue of timeliness. Since the issue of timeliness was not mentioned until the final submissions for Level IV, this issue will not be considered by the undersigned. Indeed, no evidence has ever been presented to show this grievance was untimely filed.

Discussion

This grievance, because of the severely limited evidence of record, the non-responsiveness of the Level II Decision, and the inaccurate argument made by MCBOE at Level IV presents a very confusing picture. Grievant's argument pared down to its essence
appears to be "since I was to be the most senior teacher on the RIF list and three transfers did not take place, I should be able to retain my position or at least retain employment with MCBOE."

The testimony is unrebutted that Grievant was told he was being RIF'd because other teachers with more seniority were being transferred and would "bump" into his position. Additionally, Grievant was told after these transfers and RIF's he would be number one on the RIF list. Prior to the end of the school yearMCBOE refused to follow Superintendent Conn's recommendation to transfer three teachers from Riverside Elementary. As of May 23, 1994, the date of the Level II hearing and prior to the end of the school year, Grievant's position for the 1994-1995 school year had not been filled, abolished, or posted.

Brown held that "[w]hen a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, absent some extraordinary circumstance, the employee is entitled to instatement into the position he would have held but-for [sic] the transfer. A county board of education's failure to offer such is, absent the referenced extraordinary circumstance, an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic

reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discretion." Id. at C.O.L. 1.

Hollis applied this reasoning to cases involving RIF's. In other words, if a RIF loses its justification prior to the end of the school year, the employee is entitled to retain the position. Given the above-stated facts, prior Grievance Board rulings, and the absence of any response by MCBOE, the undersigned finds the Grievant is entitled to remain in his position at Dingess Grade School. The Grievant has met his burden of proof and demonstrated that three grade school teachers were not transferred and thus would not need to "bump" into his position. Further, Grievantdemonstrated he would be first on the RIF list after all the scheduled transfers took place. The logical deduction from this data is that the Grievant should be allowed to remain in his former position.

During the entirety of this case, Respondent presented no evidence to rebut Grievant's testimony and made no legal argument as to why he could not keep his position. Obviously, Grievant has the burden of proof in this situation, but once Grievant has presented evidence minimally establishing his case, the Respondent needs to respond appropriately or risk having the grievance granted. There indeed may be evidence which would show that the Grievant's logic here is flawed, but that evidence is not before this Board and cannot be assumed.

In addition to the foregoing facts and discussion the undersigned makes the following conclusion of law.

Findings of Fact

1. Grievant, a teacher with five years seniority, was placed on the RIF list because the positions of teachers with more seniority were being eliminated.
2. The transfer of three elementary teachers, recommended because their positions were being eliminated, were not approved by MCBOE, thus they remained in their positions.
3. The Grievant was told he would be first on the RIF list because of his seniority.

Conclusion of Law

1. When an employee's RIF loses its stated justification prior to the end of the school year, the employee is entitled to keep the position absent some extraordinary circumstances. Brown, supra; Hollis, supra.

Accordingly this grievance is **GRANTED**. Grievant is to remain in his teaching position at Dingess Grade School.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 29, 1994

Footnote: 1 The record does not contain this notice.