DARRELL HALL, .

Grievant, .

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v. . Docket Numbers: 94-23-611 . 95-23-012

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LOGAN COUNTY BOARD OF EDUCATION, .

Employer. .

D E C I S I O N

History of the Case (See footnote 1)

Darrell Hall (hereinafter Grievant), an employee of the Logan County Board of Education (hereinafter Board), was laid off from his position of Mechanic Assistant by the Board on March 29, 1990, pursuant to a reduction in force. Grievant filed a grievance pursuant to West Virginia Code §§18-29-1, et seq., contesting his lay off, on April 3, 1990. A level four grievance decision wasissued by Administrative Law Judge Sunya Anderson denying the claim. See, Hall v. Logan Co. Bd. of Educ., Docket No. 90-23-467 (Mar. 19, 1991). He appealed the March 1991 decision to the Circuit Court of Logan County and, thereafter, the parties entered into a settlement agreement disposing of the issues. By Agreed Order dated September 19, 1991, the Circuit Court accepted the parties' agreement and ordered the following: 1) Grievant be instated into employment as a substitute mechanic at the Logan Bus Garage; 2) Grievant's seniority rights be restored beginning November 3, 1984; 3) The Board post all openings for mechanic positions as required by Law, and that Grievant

be allowed to bid upon them without being required to show certification for the position of mechanic; 4) The Board take all steps to immediately secure the Grievant's hiring as a substitute mechanic; and 6) Grievant not recover any back pay or reimbursement for insurance premiums.

On May 18, 1993, Grievant, through Counsel, filed a Petition for Contempt with the Logan County Circuit Court alleging that the Board had intentionally failed to post various mechanic positions as required by the Court's previous order, thereby effectuating a reduction in force of the number of mechanic positions. Grievant also contended that during the settlement negotiations of the prior appeal, the Board's Assistant Superintendent represented to him that several mechanic positions would become open in the near future because several mechanics were on medical leave due to injuries suffered while on the job. By letter of July 21, 1993,the Honorable Judge Roger Perry stated that the Board was to be bound by the representations of its Assistant Superintendent. Judge Perry requested of counsel that they confer and make proposals to him concerning the appropriate relief to be granted Grievant. Thereafter, the Board replied that it was not in contempt of the Court's September 1991 Order.

Apparently, the parties appeared before Judge Perry to present evidence and/or argument as to whether the Board was in contempt of the September 1991 Order, which led to the Court's setting aside the Agreed Order. The Court reviewed the case pursuant to Grievant's original appeal and affirmed the ALJ's March 19, 1991 decision by Order dated August 22, 1994. Thereafter, by letter dated August 26, 1994, Judge Perry informed counsel for the parties of the following:

> I have reviewed the above matter in light of developments subsequent to the Court's Agreed Order of September 19, 1991 and note:
>
> 1. The relief agreed upon in the September 19, 1991 Order could not be legally given due to unanticipated decreases in personnel.
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> 2. By Order entered August 2, 1993, the Court found the respondent entitled to relief under the terms of the Agreed Order, however, if [sic] later became apparent to the Court that relief could not be fashioned without violation of personnel policies. The Court, therefore, by Order of September 22, 1992, set aside the Agreed Order and proceeded to conduct a review of the decision of the hearing examiner Sunya Anderson.

3. By order entered, August 22, 1994 the examiner's decision was affirmed.

4. The Court finds that the respondent should be placed in the position he was prior to the September 19, 1991 Order, and considering his unsuccessful appeal of the hearing examiners [sic] decision.

5. The Court finds it appropriate to remand this matter to the West Virginia Education and State Employees Grievance Board for a hearing to determine the respondents [sic] employment status. A copy of the entire Court file is to accompany the Remand Order.

6. If appropriate, the hearing examiner may consolidate the hearing with any others involving the respondent.

An Order incorporating the findings and ruling of this letter was issued on October 13, 1994. Grievant notified this Grievance Board of the remand from the Circuit Court on October 18, 1994, asking that the Grievance Board hold a hearing as instructed by the Court, and also that another grievance pending at the lower levels of the procedure be consolidated with the original issues. The statement of grievance, dated April 14, 1993, reads as follows:

> I went back to work in [sic] the 15th day of March. I worked until March 25, 1993. Then I got lay off slip, March 1993 [sic] my position eliminated! I have a court order to be place [sic] back on seniority list regular seniority 11-3-84 [sic] put on preferred recall as top sub. mechanic. Code 18A-4-8-B - Code 18-29-1 - 18-29-2 -18-29-3. Position [sic] open and not being posted - discrimination. Remedy: Backpay and vacation and sick days from March 25th 1993 until position [sic] are posted and awarded.

After three continuances granted for good cause, a level four hearing concerning the issues of the two claims was held on May 17, 1995, at the Board's office in Aracoma, West Virginia. The parties were given until June 24, 1995, to file post hearing briefs. The case became mature for decision on September 15, 1995, after receipt of the transcript of the hearing.

Positions of the Parties

Grievant recognizes that at the time of the Hall v. Logan Co. Bd. of Educ., Docket No. 90-23-467 (Mar. 19, 1991) decision, his status was that of a substitute mechanic. However, he contends that since that time, at least two regular mechanic positions should have been posted as vacant by the Board, and that he would have received one of these positions based upon his seniority. Therefore, he claims entitlement to the status of a regularly employed mechanic.

The Board asserts that the positions referred to by Grievant were eliminated after the incumbents in those positions resigned. It maintains that during the time period brought into question by Grievant, school years 1990-1991 through 1992-1993, no vacant positions became available which were required to be posted by W. Va. Code §18A-4-8b; therefore, Grievant cannot claim entitlement to regular employment status as he would not have been able to achieve such through a competitive bidding process. Grievant responds to the Board's argument by contending that the only way the Board could have properly eliminated the two regular positions in question was to do so by a reduction in force which would necessitate various job postings and the filling of vacancies created by employee movement based upon seniority. The Board argues that it need not take any formal action to eliminate a position, and that it may assign the duties of an eliminated position to other employees within the same classification at its discretion.

Discussion

The protracted procedural history discussed above places this case in a curious posture. The Circuit Court Judge has remanded this matter to the Grievance Board to determine what Grievant's employment status should have been after the issuance of the September 19, 1991 decision, which was affirmed in October 1994. In an effort to comply with this request, it must be determined that Grievant's status in 1991 should have been that of a laid-off Mechanic Assistant, pursuant to the holding in the Hall case. At that time, he should have been placed upon the Board's preferred recall list pursuant to Code §18A-4-8b. The evidence of record establishes that Grievant has been employed by the Board as a substitute employee pursuant to an agreed order. However, this order has since been set aside; therefore, he cannot now be classified as a substitute mechanic.

The Circuit Court's Remand Order is interpreted as requiring that the Grievance Board rule upon Grievant's other grievance wherein he has alleged that the Board has not posted and filled regular employment positions it was required to fill after the resignation of at least two employees. In

reviewing the testimony presented on this issue on behalf of Grievant, it is determined that he has failed to prove that the Board has violated, misapplied or misinterpreted Code §18A-4-8b by a preponderance of the evidence. The offered evidence does not establish a sufficient "picture in time" to allow the Undersigned to conclude that the Board has illegally assigned mechanic duties to its existingregular employees or substitute employees in violation of Code §§18A-4-8b or 18A-4-16, upon accepting the resignation of two regular mechanics.

Grievant's argument that a Board may not eliminate positions except by virtue of a reduction in force is not supported by the language of Code §18A-4-8b. The provision of this Code section dealing with lay offs begins by stating, in pertinent part, "[s]hould a county board of education be required to reduce the number of employees within a particular job classification . . .." In cases where an employee voluntarily resigns his/her position, a county board is not **required** to reduce the number of employees within that classification in the context of a lay off in order to accept the resignation. There is no language in Code §18A-4-8b to support this argument.

Further, this Grievance Board has previously adressed the issue raised by Grievant in Payne v. Fayette Co. Bd. of Educ., Docket No. 94-10-144 (Sep. 28, 1994). In Payne, the grievant asserted that the board was required to post and fill a position vacated by the resignation of another regular employee. The Fayette County Board of Education contended that it had appropriately determined it did not need the position in question; therefore, it eliminated the position and assigned the remaining duties to other employees who had consented to such assignments. It was held in Payne that "[s]chool law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does notoccur." Id., at p. 4, citing Terek v. Wetzel Co. Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). It was concluded that

> A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests requires the elimination of some service personnel jobs. (citation omitted).

Payne, at p 4. Grievant has not proven that the Board has illegally failed to post any regular positions that he would have been entitled to based upon his seniority. Therefore, this grievance should be denied.

The following findings of fact have been properly deduced from the evidentiary record developed

in the case.

Findings of Fact

1. Grievant was laid off by the Board on or about March 29, 1990.

2. Grievant filed a grievance challenging his lay off and this claim was denied at level four by this Grievance Board in the case styled Hall v. Logan Co. Bd. of Educ., Docket No. 90-23-467 (Mar. 19, 1991).

3. Grievant appealed this Grievance Board's decision and the decision was ultimately affirmed by Order of the Circuit Court of Logan County dated October 13, 1994.

4. The Board has not had any vacancies in any regular mechanic positions since the decision in Hall referred to above in finding of fact number 2.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant bears the burden of proving his claims by a preponderance of the evidence. W. Va. Code §18-29-6.

2. Grievant has failed to establish any violation, misinterpretation or misapplication of either W. Va. Code §§18A-4-8b or 18A-4-16 by a preponderance of the evidence.

3. Pursuant to the Logan County Circuit Court's Order of Remand, Grievant's employment status is hereby determined to be that of a laid off, regular mechanic who should be placed upon the Board's preferred recall list pursuant to W. Va. Code §18A-4-8b.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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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ALBERT C. DUNN, JR.

Administrative Law Judge

December 21, 1995

Footnote: 1This discussion is based upon a review of statements made by the parties' counsel and various copies of the pleadings and documents from the Court's file for this case as it proceeded through the Logan County Circuit Court. The official "court file" has not been reviewed by the Undersigned.