NELLIE L. WELLMAN

v. Docket No. 95-27-327/300

MERCER COUNTY BOARD OF EDUCATION

DECISION

During the 1994-95 school term, the grievant, Nellie Wellman, was employed by the Mercer County Board of Education (Board), as a Cook II at Ceres Elementary School (CES). On May 8, 1995, she filed a grievance over the Board's decision to transfer her from that position effective the beginning of the 1995-96 school year. That complaint, which was denied at the lower levels, was appealed to Level IV July 10, 1995. A second complaint, which was filed June 22, 1995, and concerns the failure of the Board to provide her a specific assignment for the 1995-96 school year, was also denied at Levels II and III, and reached Level IV July 25, 1995. The parties subsequently agreed that the two cases could be consolidated, and that a decision could be rendered on the record developed at the lower levels. The parties submitted proposed findings of fact and conclusions of law by September 18, 1995. (See footnote 1)

Background

Much of what precipitated the grievances is not in dispute. At the time of the actions complained of, the grievant had been employed by the Board as a cook for twenty-seven years and was more senior than Barbara King, the only other cook employed at CES. The arrangement at CES was unusual in that Ms. King was the Head Cook or Cook III while the grievant was a Cook II. (See footnote 2)

In the spring of 1995, the Board concluded that because of a drop in countywide student enrollment and a corresponding drop in state funding, it would have to eliminate approximately fifteen school service positions. Superintendent of Schools Deborah Akers and Personnel Director Roger Daniels reviewed the "cook-to-meal"ratios of various schools to determine which facilities could sustain a reduction and still maintain an efficient food delivery system. They ultimately determined

that the ratio at CES was higher than that of other schools.

Mr. Daniels subsequently met with Ms. King and the grievant and advised them that CES's cook staff would most likely be cut by one-half of a position effective the beginning of the 1995-96 school year. He inquired whether they believed it feasible to cut Ms. King's Cook III position by one-half. The grievant responded that a half-time Head Cook and full-time Cook II arrangement would be practical only if the Head Cook's hours were not entirely consumed by paperwork duties and she assisted in the preparation of meals. In response to Mr. Daniels' inquiry, the grievant stated that she was not interested in the Head Cook position.

Subsequently, James Akers, the Board's Director of Child Nutrition, advised Mr. Daniels that a one-half Cook III and full-time Cook II arrangement would not work at CES. Mr. Daniels and Superintendent Akers eventually settled on a full-time Cook III and half-time Cook II configuration for the school. Thus, the grievant's position was to be reduced by one-half.

Code §18A-4-8b mandated that the reduction be made on the basis of countywide seniority. Accordingly, while it was the position occupied by the grievant that was to be reduced by half, it was Susan Tabor, the least senior cook in the school system, that was given notice that her employment would be reduced by thatamount. Ms. Tabor was employed at Princeton High School at the time.

Apparently, Superintendent Akers and/or other administrators concluded that Code §18A-4-8b also mandated that transfers of service personnel from the school targeted for a cut be based on the relative seniority of those employees at the school in the classification to be reduced. It was initially determined that Ms. King, the less senior employee, would be transferred and that the grievant would then be eligible to apply for the vacated Cook III position. Faced with the grievant's lack of interest in the post, Superintendent Akers provided both cooks notice per Code §18A-2-7 that she would recommend to the Board that they be placed on a transfer list. The grievant requested and was afforded a hearing before the Board. The Board subsequently accepted the recommendation. (See footnote 3)

The CES Cook III and one-half time Cook II positions were then posted as vacant for the 1995-96 school year. At about the same time, two one-half time Cook II vacancies were announced at Lashmeet/Matoaka School and Bluefield High School.

Ms. King applied for and was awarded her "old" Cook III position at CES. Ms. Tabor was appointed to the one-half time CES position. The grievant refused to make applications for other

positions. As the new school year approached, the Board determined that Ms. Tabor's former position at Princeton High School was theonly Cook II vacancy remaining, and advised the grievant that she would be placed there.

Subsequent to being informed of this placement, the grievant identified a Cook II position at Glenwood Elementary School which she believed to be vacant, and suggested to the Board that she would withdraw her complaint over the transfer from CES if she were awarded that post. The second grievance was filed when the Board refused that arrangement on the grounds that the Glenwood position was being "held" for Ms. Mary Harry, a regular employee on leave due to a compensable work-related injury.

It is undisputed that Ms. Harry has been off work for approximately five years and that each year, the Board has appointed substitutes to serve in her place. The record also reflects that the Board has consistently adhered to the practice of holding positions since 1990.

Argument

The grievant advances several arguments for reversal of the Board's decision to transfer her from CES. First, she contends that Code §18A-4-8b mandated that the Board reduce the CES Cook III position by one-half and transfer Ms. King to the Princeton High School position. Second, she asserts that there was no real need to reduce the number of cooks assigned to CES or the overall number of cooks employed by the Board. Finally, the grievant asserts, at least implicitly, that it was arbitrary and capricious for the Board to reject a one-half time Cook III and full-time Cook II arrangement at CES.

As to the Board's refusal to grant her the Glenwood Elementary position, the grievant asserts generally that the Board acted arbitrarily and capriciously and specifically contends that the failure to announce the position as vacant was violative of portions of Code §18A-4-8b concerning posting and the manner in which school service personnel jobs are to be filled. The Board responds that its reduction-in-force actions were in compliance with Code §18A-4-8b, and that its decision not to post the Glenwood Elementary School job was in compliance with the provisions of Code §23-5A-3.

Analysis

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

> Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided,

> That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

It is clear that by reducing the employment of Ms. Tabor, the least senior Cook in the school system, by one-half, the Board adhered to these provisions. The statute contemplates release of the least senior employee(s) in the school system in the targeted classification and not the least senior employee at the particular site where the reduction is indicated. See, Brewster v. Lincoln County Bd. of Educ., Docket No. 22-87-081-1 (Dec. 1, 1987). It isthe employee whose employment is to be terminated or reduced who has seniority-based rights, if any, under the statute. (See footnote 4)

The grievant was the subject of a transfer and was never the target of an employment term reduction. The assertion that W.Va. Code §18A-4-8b mandates that transfers necessitated by a reduction-in-force also be based on seniority has been rejected on numerous occasions. See, e.g., Gonzales v. Harrison County Bd. of Educ., Docket No. 91-17-227 (Dec. 31, 1991); Norman v. Greenbrier County Bd. of Educ., Docket No. 90-13-345 (Nov. 30, 1990); McClure v. Kanawha County Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988). While the statute provides that "[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided," the remaining language makes no mention of transfers. Thus, the Board was under no statutory obligation to consider the relative seniority of the grievant and Ms. King when effecting the reduction of staff at CES.

County boards may, however, adopt and be held to a policy whereby seniority is the basis for determining which employee is to be transferred from a worksite when it is necessary to reduce the workforce at the site. Norman at 7. There is no evidence in the present case, however, that the Board has formally adopted such a policy. There is also no evidence that the Board had establishedan informal practice of making seniority determinative. (See footnote 5) Rather, the record supports that while the Board was attempting to use seniority in making the reduction at CES, its efforts were based on a misinterpretation of Code §18A-4-8b.

Accordingly, the termination of the grievant's CES assignment and her placement on the transfer list were governed by W.Va. Code §18A-2-7 (See footnote 6) and the pronouncement in Tenney v. Bd. of Educ. of the County of Barbour, 398 S.E.2d 114 (W.Va. 1990), that transfers of school employees must be accomplished in a manner which is not arbitrary and capricious. The grievant

concedes she was afforded the notice and hearing required by the statute and her remainingclaims are, in essence, allegations that the Board acted arbitrarily in terminating her CES assignment.

The grievant's claim that there was no need to reduce the Board's cook workforce is based entirely on Mr. Daniels' testimony regarding the one-half time cook positions announced at Lashmeet\Matoaka School and Bluefield High School shortly after the notice of her transfer was issued. According to the grievant, the postings demonstrated a need to add rather than reduce cooks.

At best, this evidence establishes only that there was a need to add staff at Lashmeet and Bluefield High at the same time the Board determined that a reduction could be made at CES. It does not demonstrate that the overall number of cooks in the school system was not reduced.

Moreover, the grievant's argument ignores that cooks were simply part of the Board's total school service personnel workforce, and that the reduction-in-force was not confined to that classification. The reduction of Ms. Tabor's employment term may have allowed the retention of positions in other classifications or reductions in those classes may have permitted the additions to the cook staff at Bluefield and Lashmeet. The record conclusively establishes that the Board had been notified of a decrease in state funding for school service personnel slots for the 1995-96 school year and that at least fourteen slots were ultimately eliminated. Whether the overall number of cook positions was eventually increased or decreased in that process is of little significance to the issue of whether the grievant's transfer was proper.

Further, the record fully supports that CES was properly targeted for a reduction. The grievant presented no evidence whatsoever to dispute the Board's determination that CES's cook-to-meal ratio was higher than that of other schools and that it was, therefore, a logical choice for a reduction in staff.

To the extent that the grievant asserts that it was arbitrary for the Board to reject a one-half Cook III and full-time Cook II arrangement at CES, the argument is also without merit. The grievant expressed an opinion, during her Level II testimony, that such an arrangement would work if the one-half Cook III assisted in the preparation of meals, but she presented no evidence to discredit or even call into question Mr. Akers' conclusion that it would not. In the absence of such evidence, Mr. Akers' assessment must be accepted as the more valid one.

The undersigned can find no provision in W.Va. Code §§18A-1-1 et seq., which directly or by implication obligated the Board to sever its employer-employee relationship with Ms. Harry and post

her Glenwood Elementary School position as a vacant, permanent position. (See footnote 7) Further, W.Va. Code §23-5A-3, upon which the Boardrelies heavily, did not require the Board to maintain that relationship or hold the position for her. The statute merely proscribes discrimination against the employee and specifically prohibits employers from refusing reinstatement to a previous job "provided that the position is available" or to a "comparable position which is available."

Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard pronounced in Dillon v. Board of Educ., 351 S.E.2d 58 (W.Va. 1986). See, Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W.Va. 1991); Moses v. Mercer County Bd. of Educ., Docket No. 93-27-001 (April 8, 1993). Like the grievant's transfer, the standard applies to the propriety of the Board's practice of using substitutes to temporarily replace absent injured employees.

While Code §23-5A-3 does not require an employer to hold an injured employee's former position open, its terms do provide a rational basis for the Board's practice. It is entirely reasonable that the Board would rather maintain the availability of a position than take the risk of having to create a new and perhaps unneeded "comparable" post. Notice is taken and the present case illustrates, that county boards face yearly demands to reducepositions, and that an addition to the payroll, even a needed one, is no small matter. The grievant presented no evidence to show that the Board's refusal to place her in the Glenwood Elementary position was motivated by reasons other than its assessment of the provisions of Code §23-5A-3 and concerns over staff size.

Finally, it is significant that the Board has consistently adhered to its practice since the enactment of Code §23-5A-3, and that the grievant did not show that any other regular service employees have been afforded the opportunity to bid upon the positions of injured employees on leave. Accordingly, it is concluded that the grievant has failed to show that the Board's practice is arbitrary or capricious.

In addition to the foregoing, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) In the spring of 1995, because of a drop in student enrollment and a corresponding cutback in state funding for school service personnel positions, the Mercer County Board of Education initiated a reduction-in-force of its service employee staff.

2) The Board ultimately determined that the "cook-to-meal" ratio at Ceres Elementary School was higher than that of other schools and decided to eliminate one-half of a Cook II position assigned to the school.

3) Susan Tabor, the least senior Cook II in the school system, was given notice per W.Va. Code §18A-2-2 that her full timeemployment would be reduced by half. Ms. Tabor was assigned to Princeton High School.

4) The grievant, a Cook II, assigned to Ceres during the 1994-95 school year, was given notice per W.Va. Code 18A-2-7 that she would be recommended for transfer for the 1995-96 school year. The Board afforded her a hearing on the matter and accepted the recommendation.

5) Barbara King, a less senior Cook III assigned to Ceres, was also placed on a transfer list.

6) Shortly after the grievant received her transfer notice, two half-time cook positions were added at Lashmeet/Matoaka School and Bluefield High School.

7) Ms. Tabor's former Cook II position at Princeton High School, Ms. King's former Cook III position at Ceres and a half-time Cook II position at Ceres were posted as vacant for the 1995-96 school year. Ultimately, Ms. Tabor was awarded the half-time position and Ms. King was "re-appointed" to the Cook III post.

8) The grievant declined to make applications for vacancies and was, therefore, notified that she would be placed in Ms. Tabor's former position at Princeton High School. She initiated grievance proceedings over her transfer.

9) The grievant subsequently identified a Cook II position at Glenwood Elementary School she believed to be vacant and offered to withdraw her grievance over her transfer if she were awarded the post. The Board declined on the basis that substitutes wereserving in the post pending the return of Mary Harry, an employee on leave due to a compensable work-related injury.

10) Since 1990, the Board has consistently adhered to a practice of not terminating its relationship with employees on injury-related leave and utilizing substitutes to serve in their absence until they are fit to return or their positions are eliminated in a reduction-in-force.

CONCLUSIONS OF LAW

1) When implementing a reduction-in-force of school service employees, a board must terminate the employee in the school system with the least amount of seniority within the particular

classification to be reduced. W.Va. Code §18A-4-8b; Brewster v. Lincoln County Bd. of Educ., Docket No. 22-87-081-1 (Dec. 1, 1987). The Board complied with this mandate by reducing Ms. Tabor's employment term.

2) Code §18A-4-8b does not mandate that transfers of school service personnel from a school targeted for a reduction in staff be based on the relative seniority of the employees assigned to the school in the classification to be reduced. Gonzales v. Harrison County Bd. of Educ., Docket No. 91-17-227 (Dec. 31, 1991).

3) A county board of education may adopt and be bound by formal written policy whereby seniority is the basis for such transfers. Norman v. Greenbrier County Bd. of Educ., Docket No. 90-13-345 (Nov. 30, 1990). The grievant has failed to show that the Board has adopted such a policy.

4) The grievant was afforded her right to notice and hearing per W.Va. Code §18A-2-7 prior to her placement on the transfer list for reassignment during the 1995-96 school year.

5) The grievant has failed to prove by a preponderance of the evidence that the Board acted arbitrarily or capriciously in any aspect of the termination of her CES assignment or her placement at Princeton High School.

6) There is no statutory requirement that a county board of education terminate its relationship with an employee on leave due to a work-related injury and post the employee's position as vacant.

7) The Board's practice of "holding" the positions of regular full time employees on leave and using substitutes in their absence is consistent with the requirement in W.Va. Code §23-5A-3 that such employees must be reinstated to former positions if available or to comparable positions and, in any event, is not an arbitrary and capricious practice.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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 theintent 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

ADMINISTRATIVE LAW JUDGE

Dated: November 30, 1995

Footnote: 1Attached to the grievant's proposals were several documents, including a Board employee handbook and correspondence authored byBoard counsel. The grievant makes reference to and to some extent relies on these documents in the arguments set forth herein. A review of the transcript of the Level II hearing reveals that this evidence was not offered or made part of the records. Board counsel filed objection to their consideration for that reason.

The undersigned finds that in requesting a decision on the record, the grievant and her counsel fully understood that only evidence formally admitted at the Level II hearings and considered by the Level II evaluator would be considered at Level IV. Further, any legal contentions made at Level IV which are predicated on the documents could not have been raised at the lower level. Accordingly, the evidence and those arguments are not properly part of the case.

Footnote: 2W.Va. Code §18A-4-8 defines Cook II as "personnel employed to interpret menus, to prepare and serve meals in a food service program of a school and shall include personnel who have been employed as a Cook I for a period of four years, if such personnel have not been elevated to this classification within that period of time." The statute defines Cook III as "personnel employed to prepare and serve meals, make reports, prepare requisitions for supplies, order equipment and repairs for a food service program of a school system." Head Cook is the Board's designation for Cook III.

Footnote: 3The record does not reflect whether Ms. King requested a hearing.

Footnote: 4The record does not reflect whether Ms. Tabor acquired the one-half time post at CES by virtue of this provision. It appears likely that for purposes of her application for the post, she was considered as being on a preferred recall list and that other regular employees declined to take the part-time position.

Footnote: 5Even if the evidence indicated such a policy, questions concerning its validity and application to the facts of this case would remain. It appears that a policy which would dictate the transfer of a Cook III from a school when a Cook II position was properly targeted for reduction would be compelling the illogical and may be at odds with W.Va. Code §18A-4-8b. The Cook III would certainly have cause to question the soundness of such a regulation.

Footnote: 6The statute, in relevant part, provides,

> *The Superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. . .Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education.*

Footnote: 7It is noted that the grievant appears to assert that by refusing to agree to her terms for settling the first grievance, i.e., her placement in the Glenwood position, the Board acted arbitrarily. She specifically contends that "The Board should have transferred Wellman [to the Glenwood position] upon her request." Obviously, a claim of bad faith in settlement negotiations does not meet the definition of grievance found in W.Va. Code §18-29-2(a). Further, the grievant does not cite and the undersigned is unaware of any legal theory or statutory authority whereby an employee on the transfer list can ever obtain a position "by request." Unless an employee on the list refuses to make applications for positions, as was the case here, his or her placement must be accomplishedthrough competitive bidding. See, Parker v. Summers County Bd. of Educ., Docket No. 89-45-434 (Dec. 14, 1989). Accordingly, as discussed herein, if the grievant has any rights vis-a-vis the Glenwood position, they are found in those provisions of Code §18A-4-8b regarding posting and the order in which applicants must be considered for permanent positions.