MARGARET ROBATEAU,

Grievant,

v. **DOCKET NO. 95-06-213**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Margaret Robateau, filed this grievance on March 31, 1994, alleging:

> Violations of W.V. Code 18A-2-2, 18A-4-7a, and 18-29-2 section p "reprisal" in regard to grievant's reduction-in-force and the elimination of her position as coordinator of computer services. Reprisal for testifying at Level IV grievance of another employee. Relief sought is to be reinstated to her position for school year 1994-95 and compensated for any loss of wages and benefits.

Following adverse decisions at Levels I, II and III, Grievant appealed to Level IV on May 25, 1995. Hearing was held on July 12, 1995, and following the submission of the transcript of Grievant's reduction-in-force hearing before Respondent, and receipt of the parties' Proposed Findings of Fact and Conclusions of Law, this matter became mature on February 16, 1996.

Background

Grievant was employed for approximately five years as Coordinator of Computer Services by the Cabell County Board of Education, and was paid under pay grade H ofthe State Minimum Pay Scale for service personnel. Pay grade H includes Directors or Coordinators of services, programmers, and supervisors of maintenance and transportation. W. Va. Code § 18A-4-8a. Grievant worked closely with Mary Adkins, Coordinator of Systems Development, who also was paid under pay grade H.

Prior to March, 1994, W. Va. Code § 18A-4-8 defined "[d]irector or coordinator of services: as "personnel not defined as professional personnel or professional educators in section one [§ 18A-1-

1], article one of this chapter, who are assigned to direct a department or division." W. Va. Code § 18A-1-1 divides school board employees into two categories: "professional personnel" and "service personnel." The statute defines these two categories of employment as follows:

> (b) "Professional personnel" shall mean persons who meet the certification and/or licensing requirements of the State, and shall include the professional educator and other professional employees.
>
> (e) "Service personnel" shall mean those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, and as aides.

Code § 18A-1-1 further divides "professional personnel" into two categories: "professional educators" and "other professional employees," defining the latter as follows:

> (d) "Other professional employee" shall mean that person from another profession who is properly licensed and is employed to serve the public schools and shall include a registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program.

West Virginia law does not presently recognize employment other than professional or service, so an employee or position must be one or the other. Pugh v. Hancock County Bd. Of Educ., Docket No. 90-15-024 (July 12, 1990).

Previously, there was nothing to preclude "professional" employees from taking a position in pay grade H, thereafter getting paid from the service personnel salary schedule. Apparently due to concerns of school service personnel regarding the number of service positions being taken up by professionals in pay grade H, the Legislature amended the definition of "Director or coordinator of services" classification, effective March 20, 1994, as follows:

> "Director or coordinator of services" means personnel who are assigned to direct a department or division. Nothing herein shall prohibit professional personnel or professional educators as defined in section one [§ 18A-1-1], article one of this chapter, from holding this class title, but professional personnel shall not be defined or classified as service personnel unless the professional personnel held a service personnel title under this section prior to holding class title of "director or coordinator of services": Provided, That funding for professional personnel in positions classified as directors or coordinators of services who were assigned prior to the first day of May, one thousand nine hundred ninety-four, shall not be required to be redirected from service personnel categories as a result of this provision until the first day of July, one thousand nine hundred ninety-six. Thereafter, directors or coordinators of service

> positions shall be classified as either a professional personnel or service personnel position for state aid formula funding purposes and funding for directors or coordinators of service positions shall be based upon the employment status of the director or coordinator either as a professional personnel or service personnel.

The effect of this amendment is allow Board's to employ "professional" employees in a traditional "service" classification, as long as the professional is paid from the professional employees pay schedule. The Board was aware of the activity in the Legislature concerning this issue and began discussions at least a year prior to theenactment of the legislation about how it was going to comply with the amendment. It became clear that the Board would need to sort out its employees currently in pay grade H and perhaps eliminate some positions in order to comply with the amendment while remaining fiscally responsible.

In school year 1992-1993, Grievant's and Ms. Adkins' positions were considered for reduction-in-force, and they were so notified. However, the Board decided not to eliminate those positions in school year 1992-1993. In school year 1993-94, the subject of reduction-in-force arose again. The administrative staff of the Board met on January 6, 1994, to review the positions to be eliminated and Grievant's position was identified. Discussions continued on this subject until February 25, 1994. The Board determined that Grievant and Ms. Adkins were performing identical functions, and there was a lack of need for two Coordinators of computer systems. A recommendation was made to eliminate their positions, combine their duties into one new position, and post that new position at a lower salary.

In the meantime, Grievant and Ms. Adkins were subpoenaed to testify at the Level IV Grievance hearing of co-worker John Dillon on March 8, 1994. Grievant and Ms. Adkins testified that their supervisor was upset about the subpoenas and wondered aloud how Mr. Dillon's representative got a copy of Ms. Adkins' job description, which was relevant to the issue in Mr. Dillon's grievance. Nonetheless, Grievant and Ms. Adkins testified that their supervisor advised them to go the hearing and to tell the truth.

By letter dated March 10, 1994, Grievant was notified she would be affected by the reduction-in-force of personnel, and was given an opportunity to be heard before theBoard. Grievant appeared before the Board on March 17, 1994, after which the Board voted on March 22, 1994, to approve the recommendation of the Superintendent that Grievant's position be eliminated. Ms. Adkins' position was also eliminated.

In June, 1994, the position of Computer Information Systems Coordinator was posted by the Cabell County Board of Education. This position was offered to Grievant and Ms. Adkins, and both refused. Grievant and Ms. Adkins both testified at Level IV that this position was the same position they had previously performed for the Cabell County Board of Education.

Grievant does not seek to be instated into the current computer services position at Cabell County; rather, she wishes that her old position at her old salary be returned and she be placed in that position.

Discussion

Grievant asserts, and interestingly, the Board does not dispute, that she is a "professional" employee, and thus, the reduction-in-force provisions of W. Va. Code §§ 18A-2-2 and 18A-4-7a, dealing with professional employees, apply in this instance. Grievant has not presented any evidence to support her theory that she is a professional employee under the statute. She was hired by the Board into the Coordinator position, and other than perhaps a college degree which the position may require, has not presented any evidence of any licensure or certification that would qualify her as a "professional" employee. See Dillon v. Cabell County Bd. Of Educ., Docket No. 93-06- 438 (Aug. 9, 1994)(wherein, interestingly, Respondent took the position that Mr. Dillon, a Coordinator of Technical Services, was a "professional" employee). The AdministrativeLaw Judge found that Mr. Dillon, as well as Ms. Adkins, whose position was compared to Mr. Dillon's, were both "service" employees under the applicable statutes.

Thus, as Grievant is not a professional employee, Code §§ 18A-2-2 and 18A-4-7a are inapplicable to Grievant's reduction in force, and Grievant has failed to state a claim under which relief can be granted under those statutes.

Grievant also alleges her termination was in retaliation for testifying at the Level IV grievance of Dillon v. Cabell County Bd. Of Educ., supra. Reprisal is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." The order and allocation of proof to establish that a retaliatory discharge has occurred was discussed in Frank's Shoe Store v. Human Rights Com'n., 365 S.E.2d 251 (W.Va. 1986), wherein the following approach was set forth:

> The burden is upon the complainant to prove by a preponderance (1) that she engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that her discharge followed his or her protected activities within such a period that the court can infer retaliatory motivation.

Id. citing, McDonnell Douglas Corp. v. Green, 411 U.S. 792. 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This Grievance Board has adopted this standard as a test to judge whether a discharged employee has established a prima facie case of retaliatory discharge. Conner v. Barbour County Bd. of Educ., Docket No,. 93-01-154 (Apr. 8, 1994). After a prima facie case is made, the burden of production is shifted to the employer to offer a legitimate reason for its action. The former employee may still prevail if he or she can prove by a preponderance of the evidence that the employer's proffered legitimatereason is only pretextual. Grievant testified at John Dillon's Level IV grievance hearing on March 8, 1994. Grievant was notified of her termination on March 10, 1994. Thus, Grievant has successfully made a prima facie case of reprisal. However, Respondent has offered sufficient evidence that the discussion of the elimination of Grievant's position began at least a year before her termination and her testimony at Dillon's grievance hearing. Further, the recommendation to eliminate Grievant's position was made in February, 1994, at least one month prior to her appearance in the grievance hearing. Finally, Respondent offered Grievant the newly created position of Coordinator of Computer Services, which she declined. Respondent would not have offered her another position if it wished to have her dismissed.

Interestingly, Respondent offered that Grievant's testimony at John Dillon's grievance was, in fact, favorable to the Board's position in that matter, and thus, any motivation for reprisal against Grievant for her participation in that matter is non- existent. However, the issue in that case was whether Mr. Dillon should be considered a "professional" or "service" employee for pay purposes. Ms. Adkins and Grievant testified they were considered "service" personnel. The Board proposed then, as it apparently does now, that Coordinator positions were, and are, "professional" positions. Thus it appears that Grievant's testimony at Mr. Dillon's grievance hearing was not necessarily favorable to the Board's position.

Nevertheless, the undersigned finds that the Board has articulated a legitimate reason for its decision to eliminate Grievant's position, i.e., to sort out its professionaland service personnel currently in pay grade H in anticipation of the newly- enacted legislation, and to determine which of

those positions could be eliminated in order for the school system to operate in a fiscally responsible manner.

The following findings of fact and conclusions of law supplement the above discussion.

Findings of Fact

1. Grievant was employed by the Cabell County Board of Education for approximately five years as Coordinator of Computer Services.

2. Grievant was assisted by Mary Adkins, the Coordinator of Systems Development.

3. The two positions occupied by Grievant and Ms. Adkins were virtually identical, and they performed many duplicative duties in their respective positions.

4. Grievant's and Ms. Adkins' positions were considered for elimination in school year 1992-93, but ultimately the Board decided not to eliminate those positions at that time.

5. Grievant's and Ms. Adkins' positions were eliminated for the 1993-94 school year.

6. Grievant's position as Coordinator of Computer Services was a service position as defined by W. Va. Code § 18A-1-1.

7. Grievant was subpoenaed and did testify at the Level IV grievance hearing of John Dillon on March 8, 1994. 8. Grievant received notice of her termination on March 10, 1994, due to lack of need.

9. Grievant was given opportunity to be heard before the Board, and in fact did appear before the Board on March 17, 1994.

10. The Board voted on March 22, 1994, to eliminate Grievant's position due to lack of need.

11. The Board posted the position of Computer Information Systems Coordinator on June 6, 1994.

12. The newly created position combined the duties of Grievant and Ms. Adkins into one position at a lower salary.

Conclusions of Law

1. In a non-disciplinary grievance, the burden is on the Grievant to prove the charges by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31,

1989).

2. County boards of education have substantial discretion in matters relating to hiring, assignment, transfer and promotion of school personnel; however, that discretion must be tempered in a manner that is reasonably exercised, in the best interests of the schools, and in a manner which is not arbitrary or capricious. Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648 (W. Va. 1995); Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

3. A board of education has broad powers to control and manage its schools and school interests, including the allocation of funding; implied in this authority is theduty to conduct the financial affairs of its school system in a financially prudent manner. Miller v. Ohio County Bd. of Educ., Docket No. 89-35-531 (Feb. 28, 1991).

4. Grievant has failed to prove her allegations that the Board violated the reduction-in-force provisions of W. Va. Code §§ 18A-2-2 and 18A-4-7a.

5. Grievant established a prima facie case of reprisal pursuant to W. Va. Code § 18-29-2(p).

6. Respondent has successfully offered a legitimate reason for eliminating Grievant's position, i.e., lack of need.

7. Grievant failed to show this rationale was merely a pretext, and thus has failed to establish a case of reprisal against Respondent.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 SWARTZ

Administrative Law Judge

Dated: March 15, 1996