

SANDRA BENNETT,

Grievant,

v. DOCKET NO. 96-49-189

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent,

and,

LUELLA SINCLAIR,

Intervenor.

DECISION

Sandra Bennett, Grievant, is employed by the Upshur County Board of Education (Respondent).

She alleges:

Grievant is currently employed as a Cook III/Cafeteria Manager. Her contract as a Cook III/Cafeteria Manager has been recommended and approved for termination for the 1996-97 school year. However, the Respondent has retained a less senior Cook III/Cafeteria Manager in such a capacity for the 1996-97 school year. The Respondent alleges a violation of West Virginia Code §18A-4-8b and requests reinstatement as a Cook III/Cafeteria Manager, and retroactive wages, benefits and seniority. [\(See footnote 1\)](#)

On April 9, 1996, after the grievance was denied at Level I by her immediate supervisor, she appealed to Level II. A Level II hearing was held on April 19, 1996, and the grievance was subsequently denied. Pursuant to W. Va. Code §18-29-4(c), the Level III hearing was waived. At Level IV, other than stipulating to three exhibits, the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, with the right to file proposed findings of fact and conclusions of law. The case matured for decision on July 17, 1996, upon receipt of post-

hearing submissions by Grievant. [\(See footnote 2\)](#)

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Cook III/Cafeteria Manager at Main Street Primary School (MSPS).

2. Grievant's seniority date is August 26, 1985. Out of thirty-nine cooks, she ranks twenty-first [\(See footnote 3\)](#) with the most seniority.

3. Respondent employs one full-time Cook III/Cafeteria Manager at each of its twelve schools.

4. Respondent voted and received approval on March 7, 1996, to close MSPS at the end of the 1995-96 school year.

5. By letter dated February 22, 1996, Assistant Superintendent Alan Sturm informed Grievant:

The Upshur County Superintendent of Schools, Dr. Richard Hoover, has notified the Upshur County Board of Education of his intention to recommend the termination of your current contract. There are three closely related reasons for this action: (1) a decrease in enrollment and a change in program needs of Upshur County Schools; (2) the closure of Main Street Primary School; and, (3) reductions in the Title I program resulting in budgetary reductions at the Federal level.

Level IV, Stipulation #4.

6. On March 12, 1996, Respondent's Superintendent recommended, and Respondent approved, the termination of Grievant's employment contract as a Cook III/Cafeteria Manager, and placed her on the transfer list. Grievant's contract was terminated because the school at which worked closed.

7. Respondent's Superintendent also recommended, and Respondent approved the reduction-in-force of their least senior full-time cook, Ann Tomblyn. Ms. Tomblyn is a Cook II at Buckhannon-Upshur Middle School (B-UMS), with a seniority date of August 21, 1995. This action was taken to comply with W. Va. Code §18A-4-8b, thus, allowing Grievant to apply for Ms. Tomblyn's position.

8. By letter dated March 18, 1996, Assistant Superintendent Alan Sturm informed Grievant:

The Upshur County Board of Education, at its regular meeting on March 12, 1996, upheld the Superintendent's recommendation to place you on the transfer list for the 1996-97 school year. This is the result of your present position being closed at the end of the current school year. As you are aware, being placed on the transfer list

means that you will have a position in your job classification during the 1996-97 school year. At this time it is not possible to determine exactly what or where that position will be.

9. On April 17, 1996, the Cook II position at B-UMS was posted.

10. On April 22, 1996, Grievant applied for the Cook II position at B-UMS. Subsequently, she was awarded this position. 11. Intervenor is the least senior Cafeteria Manager/Cook III. Her seniority date is August 29, 1988. Out of thirty-nine cooks, she ranks twenty-fifth in seniority.

POSITION OF THE PARTIES

Grievant asserts that Berry v. Kanawha County Bd. of Educ., ___ W. Va. ___, 446 S.E.2d 510 (1994), "stands for the proposition that seniority within classification must be considered if a county board of education terminates an employment contract which results in a modification of the terms of employment of a school service employee." Therefore, Grievant asserts that Respondent should not only have RIF'd the least senior cook in its employ, but also should have RIF'd Intervenor, the least senior Cook III/Cafeteria Manager. This would have given Grievant the opportunity to retain her multiclassified status.

Respondent asserts that it RIF'd the least senior cook as required by W. Va. Code §18A-4-8b, and that the Grievance Board in Murray v. Preston County Bd. of Educ., Docket No. 39-86-226-2 (Dec. 29, 1986), held that "the service employee displaced by the defunct program is to be transferred to the position vacated by the least senior (sic) employee." Respondent also contends that:

Grievant's argument that she should be allowed to 'bump' a cafeteria manager/Cook III with less seniority than her, although that cafeteria manager/cook III is not 'the employee with the least amount of seniority within that classification ...' is in opposition to the law and unsupported by any applicable precedent.

DISCUSSION

Once Respondent decided that it was closing MSPS, and had too many people in the Cook classification category, it properly determined that a RIF was in order. [\(See footnote 4\)](#) In Lucion v. McDowell County Bd. of Educ., ___ W. Va. at ___, 446 S.E.2d at 490 (1994), the Supreme Court of Appeals of West Virginia held:

If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code, 18A-4-8b [1990].

If a board of education decides to reduce the employment terms of particular jobs, the board must first terminate the existing contracts by following the procedures of W. Va. Code [§]18A-2-6 [1989], and second fill the job vacancies by following the procedures and requirements of W. Va. Code 18A-4-8b [1990]. In either case, a board of education must 'make decision affecting promotion and filling of any service personnel positions of employment or jobs. . . on the basis of seniority, qualifications and evaluation of past service.' W. Va. Code [§]18A-4-8b [1990].

(Emphasis added).

The reduction-in-force procedures of W. Va. Code §18A-4-8b provides, in pertinent part:

Each class title listed in section eight of this article shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment. The cafeteria manager class title shall be included in the same classification category as cooks.

* * *

All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section.

The seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the county board within a particular job classification. . . .

If 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 or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

The Supreme Court of Appeals of West Virginia explained how this procedure works if only one classification category is involved in Berry, supra. The Court stated:

Basically, the procedures require that where the number of employees within a particular job classification is reduced the employee with the least amount of seniority within that classification is to be released. Classifications are defined in W. Va. Code, 18A-4-8b, which utilizes the class titles contained in W. Va. Code, 18A-4-8b. There is one major exception -- 'class titles having Roman numeral designation ... shall be considered a single classification of employment.'

The other applicable statute in this case is W. Va. Code §18A-4-8g. It was enacted by the

Legislature in 1993, and provides, in pertinent part:

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [§18A-4-8e] of this articles: Provided, That when implementing a reduction in force, an employee with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification

title held by an employee within the classification category shall not be taken into consideration when implementing a reduction in force.

(Emphasis added).

Therefore, when reading these statutes in pari materia reveals that Respondent, after placing Cafeteria Managers in the pool with all Cooks, properly RIF'd the person with the least seniority in this classification category. [\(See footnote 5\)](#) The result was the RIF of Ms. Tomblyn.

Even though Respondent terminated her contract, it never intended to sever the employment relationship with Grievant. "The clear legislative intent of W. Va. Code §18A-4-8b is to preserve, when possible, the on-going employment status of long-time board of educations employees."

(Emphasis added). Roberts v. Marshall County Bd. of Educ., Docket No. 91-25-395 (Jan. 15, 1992). It is not the intent of the Code to preserve, at all costs, the employee's classification title. See Lucion, supra; W. Va. Code §18A-4-8g.

Once Grievant applied for and received the position vacated by Ms. Tomblyn, this case fell squarely under Grievance Board precedent. In May v. Mingo County Bd. of Educ., Docket No. 96-29-066 (Apr. 26, 1996), a Cook III was placed on a transfer list. In that case, the grievant alleged that her Superintendent has told her that she would remain a Cook III no matter what position she applied for. Even though, she applied for, and received a Cook I position, the board paid her Cook II wages. She grieved, and sought the difference in pay between the Cook II and Cook III positions. The Administrative Law Judge in that case concluded that the non-relegation clause found in W. Va. Code §18A-4-8 [\(See footnote 6\)](#) was not violated because the grievant voluntarily applied for the Cook I position. [\(See footnote 7\)](#)

Although Grievant may wish to be paid as a Cafeteria Manager/Cook III, there is nothing in the Code which would entitle her to she a windfall. May, supra. However, because of the operation of the statute, her employment status with Respondent is preserved, and she will have the opportunity in the future to bid on a more favorable position.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

3. "The clear legislative intent of W. Va. Code §18A-4-8b is to preserve, when possible, the ongoing employment status of long- time board of educations employees." Roberts v. Marshall County Bd. of Educ., Docket No. 91-25-395 (Jan. 15, 1992).

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

The cafeteria manager class title shall be included in the same classification category as cooks.

5. W. Va. Code §18A-4-8g provides, in pertinent part:

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [§18A-4-8e] of this articles: Provided, That when implementing a reduction in force, an employee with the least seniority within a particular classifi- cation category shall be properly released and placed on the preferred recall list. The particular classificationtitle held by an employee within the classification category shall not be taken into consideration when implementing a reduction in force.

(Emphasis added).

6. Grievant failed to prove by a preponderance of the evidence that she was entitled to be reinstated as a Cook III/Cafeteria Manager as a matter of law.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Upshur 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 are 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.

DATED: 9/20/96 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Grievant did not challenge the notice provisions of W. Va. Code §18A-2-6, entitled "Continuing contract status for service personnel; termination."

Footnote: 2 In a letter dated July 9, 1996, Respondent's counsel notified the Undersigned that Respondent did not desire to rely upon a timeliness defense at Level IV.

Footnote: 3 There are twenty people with more seniority than Grievant in the Cook classification category.

Footnote: 4 W. Va. Code §18A-4-8f, entitled "Seniority rights, school consolidation." does not address school service personnel.

Footnote: 5 W. Va. Code §18A-4-8b makes no allowance for the employee's site or job location. See Poling v. Taylor County Bd. of Educ., Docket No. 95-45-444 (Dec. 29, 1995); Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995); Brewster v. Lincoln County Bd. of Educ., Docket No. 22-87-081-1 (Dec. 1, 1987).

Footnote: 6 The non-relegation clause found in W. Va. Code §18A-4-8 provides, in pertinent part:

No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years.

Footnote: 7 Reading the quoted statutes in pari materia, it is doubtful that Grievant would have prevailed in this grievance even if she would not have applied for, and received another position.

A similar process is followed with professional employees. See Farley v. Bd. of Educ. of Mingo County, ___ W. Va. ___, 365 S.E.2d 816 (1988); State ex rel. Bd. of Educ. v. Casey, ___ W. Va. ___, 349 S.E.2d 436 (1986).