PEGGY L. SMITH, et al.,

Grievants,

v. **DOCKET NO. 96-54-271**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Peggy Smith, Pamela Reynolds, Ormal Jean Taylor, Woodrow Mace, Harold Cunningham, Gary Sutphin, Jerry Balderson, Carl Allen, William Wright, Michael McElwee, and Brian Shockey, are all regularly-employed bus operators with Respondent Wood County Board of Education. (See footnote 1) Their complaint, filed on or about June 28, 1996, is as follows:

> Grievants are regularly-employed bus operators. Respondent terminated Grievants' extracurricular/supplemental assignment contracts even though these assignments will exist during the 1996-1997 school year. These assignments are to be assigned to more senior bus operators whose 1995-1996 extracurricular/supplemental assignments were eliminated at the end of the 1995-1996 school year. This action violates West Virginia Code §§18A-2-6, 18A-2-7, 18A-4-8b, 18A-4-16 and a state superintendent's interpretation. Grievants seek reinstatement to the assignments in question and back wages and benefits.

Following adverse decisions at the lower levels, a level four hearing was held on August 27, 1996, and this case became mature for decision on September 17, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The essential facts in this matter are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants are all employed as regular bus operators for Respondent Wood County Board of Education.

2. Grievants all held extracurricular contracts for various assignments, including vocational, special education, and other types of bus runs. (See footnote 2)

3. Following several years of discussion, Respondent's elementary schools were scheduled to implement all-day kindergarten classes beginning with the 1996-97 school year. As a result of this change, there was no longer a need for 19 extracurricular, mid-day kindergarten bus runs.

4. In accordance with Respondent's Reduction in Force and Recall Policy for Service Personnel, which incorporates the provisions of W. Va. Code § 18A-4-8b, Mr. George Summers, Assistant Superintendent, School Services, elected to recommend reducing the extracurricular assignments based on overall seniority. Mr. Summers consulted the seniority list to determine the order of seniority of the employees under theextracurricular contracts and reduced from the least senior to the most senior. Bd. Tr., p. 35. Mr. Summers provided the list to the Superintendent and made a recommendation that the least senior employees be reduced. Grievants represent the less-senior employees holding extracurricular contracts.

5. By letter dated February 29, 1996, Superintendent Daniel Curry notified Grievants that he would be recommending termination of their extracurricular contracts to the Board, to be effective June 18, 1996. The reason given for the recommendation was "lack of need due to the Board of Education's intention not to have half-day kindergarten programs beginning with the 1996-97 school year resulting in the need to reduce and realign extracurricular assignments." Board Hearing Stip. Exh. 1.

6. Grievants asked for and received a hearing before the Board on March 20, 1996. LII Joint Exh. 1.

7. Grievants were notified by letter dated March 28, 1996, that, in accordance with W. Va. Code §§ 18A-2-6, 18A-2-7, 18A-4-8b, and 18A-4-8g, the Board had voted to accept the Superintendent's recommendation to terminate their extracurricular contracts due to lack of need. LII, R. Ex. 1.

Discussion

This issue in this case is whether the Grievants' extracurricular contracts should have been reduced-in-force by seniority in accordance with the provisions of W. Va. Code § 18A-4-8b. Respondent contends that it properly reduced-in-force less senior employees and allowed the more senior employees to bump into those positions, relying on a previous Grievance Board decision, Garvin v. Webster County Bd. of Educ., Docket No. 51-86-060 (Aug. 21, 1986), and a recent State

Superintendent's opinion dated August 26, 1996. Grievants contend that when extracurricular assignments are eliminated, the employees are simply given notice according to W. Va. Code § 18A-2-7, and there are no "bumping" rights associated with extracurricular contracts. Grievants rely upon the West Virginia Supreme Court of Appeals' decision in Smith v. Bd. of Educ. of County of Logan, ___ W. Va. ___, 341 S.E.2d 685 (W. Va. 1985)(Smith I), and an earlier State Superintendent's opinion dated May 23, 1989. Based upon the following analysis, the undersigned agrees with Grievants.

The West Virginia Supreme Court of Appeals has held that in order to terminate the extracurricular contract of a school employee, it is necessary to give that employee notice and an opportunity for hearing pursuant to W. Va. Code § 18A-2-7. Smith I, supra. In that case, the Court "likened the extracurricular assignment to regular employment and held that a county board of education, if it intended to alter an extracurricular assignment, had to abide by the same procedural strictures applicable to regular contracts. . . ". The Court's holding indicates that the procedure for terminating extracurricular contracts falls under the transfer provisions of Code § 18A-2-7, rather than the reduction-in-force provisions of Code § 18A-4-8b.

The State Superintendent of Schools was asked, whether employees whose extracurricular assignments were to be eliminated should simply lose their assignments, or whether the employees with the least amount of seniority should be cut. The Superintendent answered on May 23, 1989:

> The bus operators whose supplemental assignments are eliminated simply will lose their assignments. This will not be a reduction in force. (See footnote 3)

State Superintendent opinions shall be given great weight unless clearly wrong. Smith v. Bd. of Educ. of County of Greenbrier, 192 W. Va. 321, 452 S.E.2d 412 (1994)(Smith II); Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31,1996). In light of the Supreme Court's holding and discussion in Smith I regarding extracurricular assignments, it cannot be found that the State Superintendent was clearly wrong in determining that an employee holding an extracurricular assignment slated to be eliminated simply lost that assignment, and was not reduced-in-force.

However, Respondent correctly points out that this Grievance Board has held, in Garvin v. Webster County Bd. of Educ., Docket No. 51-86-060 (Aug. 21, 1986), that an employee, whose extracurricular assignment was being eliminated, was properly reduced- in-force under Code § 18A-

4-8b. Respondent's reliance on Garvin, supra, while not misplaced, must be reviewed within the history of the case law dealing with extracurricular assignments, both before and after the issuance of the Garvin decision. Initially, the analysis in Garvin is suspect, given the Supreme Court's holding in Smith I, supra, less than one year earlier, that employees holding extracurricular contracts are entitled to notice and hearing pursuant to W. Va. Code § 18A-2-7. The grievant in Garvin argued that his extracurricular assignment had been eliminated, and he was not properly notified of thetermination or given an opportunity for a hearing under W. Va. Code §§ 18A-2-8a or 18A-2- 6. The Administrative Law Judge found that neither of those statutes were applicable to extracurricular assignments, and that the grievant had been involved in a reduction in force under W. Va. Code § 18A-4-8b, stating, "[w]hen a county finds it to be necessary to reduce the number of service personnel the employee with the least amount of seniority within that classification must be released. . . ".

The Administrative Law Judge did not discuss Smith when discussing the notice provisions applicable to employees holding extracurricular assignments. Nevertheless, the Grievance Board has continued to acknowledge and follow the holding in Smith I that employees holding extracurricular assignments are entitled to the notice provisions of Code § 18A-2-7. See Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994); Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993)(involving different parties); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). Thus, it appears that Garvin, Docket No. 51-86-060, has been given very little precedential weight by the Grievance Board on the issue of notice.

The secondary proposition in Garvin, that employees whose extracurricular assignments are eliminated should be reduced-in-force, is out of step with the other authorities on the issue, specifically, Smith I, supra, and the State Superintendent's opinion of May 23, 1989. The number of service personnel is not being reduced in this situation. It is merely the number of extracurricular assignments that is being reduced. The employees all still hold their regular contracts of employment and their regular assignments. To call this situation a "reduction-in-force" is a misnomer, and the actiontaken to eliminate extracurricular assignments does not properly fit within the reduction-in-force provisions of W. Va. Code § 18A-4-8b.

In analyzing this situation, attention must be called to Berry v. Kanawha County Bd. of Educ., 191

W. Va. 422, 446 S.E.2d 510 (1994), which addresses the reduction-in-force of service personnel. In Berry, the West Virginia Supreme Court of Appeals held that a reduction-in-force can occur not only when the number of personnel is reduced, but also when job positions are eliminated. In that case, the grievant, a 261-day employee, had her contract terminated, and she was placed on the transfer list, eventually receiving a 225-day contract in the same classification. A less senior employee within the same classification was retained, and grievant alleged she should have been afforded bumping rights under the reduction-in-force provisions of W. Va. Code § 18A-4-8b. The county board argued that since the grievant was not terminated, there was no reduction-in-force. The Court held that a reduction-in-force can occur when job positions are eliminated, noting;

> 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].
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> . . .
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> . . . Basically, the procedures require that where the number of employees within a particular job classification is reduced the employee with then 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-4-8.

Berry, supra.

The undersigned does not disagree with the Supreme Court that a reduction-in-force can occur when job positions are eliminated. However, the undersigned finds a clear distinction when dealing with jobs created through extracurricular contracts of employment. The instant case presents a prime example of this distinction. The Grievants and the more senior bus operators that have bumped them out of their extracurricular contracts are all employed as regular bus operators by Respondent. When a bus operator applies for a position with a county board of eduction, he or she is employed as a "bus operator", not as a bus operator for a specific route at a specific place. Tolliver v. Mingo County Bd. of Educ., Docket No. 95-29-475 (May 31, 1996). Therefore, when changes need to be made in the bus schedule in the county, bus operators can be reassigned to different routes and bump less senior bus operators.

However, these same bus operators then opted to bid on posted extracurricular contracts that

were designated as specific types of bus routes, at specific times and places. Thus, the successful applicant is then designated as, for instance, the "Vo-Tech" bus operator for a specific school at a specific time and place. He or she is no longer a generic bus operator for the purposes of that extracurricular contract, and his or her job title is not necessarily one that can be found in the W. Va. Code § 18A-4-8 list of job classifications.

This example becomes even more evident when dealing with other types of extracurricular contracts. For instance, most, if not all, coaching positions are filled through extracurricular contracts. An individual is hired as a football coach, a basketball coach, or a soccer coach. If the football coach position is eliminated, it makes no sense to allow the individual holding the football coach position to bump the less-senior soccer coach. While it is easier to effect such a scenario with bus operators, the long-term effects of such a ruling would lead to the absurd result illustrated above. Finally, when holding that the grievant in Berry was entitled to bump a less-senior Clerk II, the Court spoke specifically to the procedures in Code 18A-4-8b which allow more senior employees within a particular job classification to bump less-senior employees within that classification. In the matter of extracurricular contracts, there are no "job classifications." Many titles given to individuals holding extracurricular contracts do not exist as "job classifications" within the meaning of Code § 18A-4-8. See Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-553 (Aug. 21, 1996). Thus, the undersigned finds that the reduction-in-force provisions of Code § 18A-4-8b simply do not apply to extracurricular contracts of employment.

Finally, Respondent relies upon a recent State Superintendent's opinion dated August 26, 1996, which, in direct conflict with the May 23, 1989 opinion, states that employees holding extracurricular assignments which are to be eliminated should be reduced-in-force according to the provisions of Code § 18A-4-8b. This opinion was rendered after the date of the action in question in the instant grievance, and Grievants object to its use in deciding the instant grievance. However, the law is constantly changing, and the undersigned is unaware of any rule that prohibits Respondent from introducing current statements of the law at any time which would impact upon its case. Further, because this opinion is in direct conflict with the earlier State Superintendent's opinion, it is imperative that the undersigned consider this recent opinion in order to implement a ruling which will, hopefully, avoid further confusion on this issue.

The two conflicting State Superintendent's opinions were both rendered by Superintendent Henry

Marockie. The most recent opinion cites no authority for its position, nor does it acknowledge the earlier opinion on the same issue. As noted in Smith II, supra:

> While the existence of conflicting opinions from two state superintendents admittedly raises a question of the precedential value to be accorded the opinions, nonetheless, we have previously stated that: "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." . . . The interpretation currently in effect is that of Mr. Marockie, and unless we can find clear error in such opinion, it should be accorded "great weight." Id. Nonetheless, as is our custom, we independently analyze this issue of statutory interpretation.

In Smith II, supra, the two conflicting opinions were issued by two different State Superintendents and the more recent opinion acknowledged the earlier conflicting opinion, stating "[t]his interpretation is a reversal of the position taken in 1986 by Dr. McNeel." Thus, there was some evidence that a reasoned analysis of the current state of the law had been undertaken by Dr. Marockie before issuing the reversal.

In the instant case, both opinions were issued by Dr. Marockie, and the most recent opinion makes no reference to the earlier opinion, nor is there any legal analysis accompanying the more recent opinion. Therefore, consistent with the Supreme Court's direction in Smith II, supra, the undersigned has independently analyzed this issue of statutory interpretation, and, consistent with that analysis, concluded that, to the extent the August 26, 1996, State Superintendent's opinion follows the holding in Garvin, it is hereby determined to be clearly wrong.

Conclusions of Law

1. In order to terminate the extracurricular contract of a school employee, it is necessary to give the employee notice and an opportunity for hearing pursuant to W. Va. Code § 18A-2-7. Smith v. Bd. of Educ. of County of Logan, ___ W. Va. ___, 341 S.E.2d 685 (W. Va. 1985). 2. Termination of extracurricular contracts does not result in a reduction in force. The employee with the terminated extracurricular contract simply loses his or her assignment and has no right to displace a less senior employee from his or her extracurricular contract.

3. To the extent Garvin v. Webster County Bd. of Educ., Docket No. 51-86-060 (Aug. 21, 1986), holds otherwise, it is hereby overruled. Also, to the extent the State Superintendent's opinion dated August 26, 1996, follows the holding in Garvin, it is determined to be clearly wrong.

Accordingly, this grievance is **GRANTED**, and Respondent is hereby **ORDERED** to reinstatement Grievants to the extracurricular assignments they held in the 1995-1996 school year, and compensate Grievants for all back wages and benefits associated with those extracurricular assignments. Respondent is also **ORDERED** to develop and enter into written extracurricular contracts with all affected employees in accordance with W. Va. Code § 18A-4-16.

October 31, 1996 MARY JO SWARTZ

Footnote: 1

Grievant Brian Shockey filed a separate grievance involving the same matter, which was consolidated with the instant grievance by Order dated July 16, 1996.

Footnote: 2

Mr. George Summers, Assistant Superintendent, School Services, testified that there are no written extracurricular contracts with Grievants, which he acknowledges is in violation of W. Va. Code § 18A-4-16. Mr. Summers testified that, despite the lack of a written contract, Grievants were treated as if they had a written contract with respect to all due process rights to which they might be entitled. Grievants are not alleging any violations of statute with regard to notice or due process rights under statute.

Footnote: 3

The "supplemental" runs in question in this opinion consisted of Vo-Tech midday runs, and Special Education midday runs, among others, similar to the extracurricular runs at issue in this grievance. It should be noted that the terms "supplemental" and "extracurricular" are frequently used interchangeably, but that, technically, there are no "supplemental" assignments, only "extracurricular" and "extra- duty" assignments. "Extracurricular" assignments are governed by W. Va. Code § 18A-4- 16, while "extra-duty" assignments are governed by W. Va. Code § 18A-4-8b.