IRVIN VEST

v. Docket No. 92-27-237

MERCER COUNTY BOARD OF EDUCATION

DECISION

The grievant, Irvin Vest, is currently employed by the Mercer County Board of Education (Board) as a teacher at the Mercer County Alternative School. He filed a grievance March 31, 1992, protesting the termination of his employment in a reduction-in- force (RIF). The grievant's supervisor was without authority to address the matter at Level I, and the grievance was denied at Level II following a hearing held April 28, 1992. The Board, at Level III, affirmed the Level II findings and an appeal to Level IV was made July 1, 1992. A hearing was held March 8, 1993, August 9, 1993, and March 24, 1994. (See footnote 1) Proposed findings of fact andconclusions of law were submitted by May 9, 1994. On the undersigned's initiative, a supplemental hearing was held October 10, 1995. (See footnote 2)

Background

Much of the factual background of the case is undisputed. In early 1992, the Board concluded that declining student enrollment and a corresponding reduction in state funding for professional positions necessitated the elimination of several such positions effective the end of the of the 1991-92 school term. The enrollment and scheduling needs of each school in the system were carefully reviewed to ascertain where the cutbacks could be made. Ultimately, Assistant Superintendent of Schools Ted Mattern determined that Montcalm High School (MHS), where the grievant was then employed as a full-time social studies instructor, could losea social studies position. (See footnote 3) The record reflects that while projected overall enrollment figures for MHS did not indicate a drop in its student population for the 1992-93 school term, specific enrollment figures for social studies classes at the school were such that the loss of a position would create a student-teacher ratio in the social studies department which was comparable to that of other schools in the system. Then- Superintendent of

Schools William Baker subsequently accepted Mr. Mattern's recommendation to make the reduction.

It was further determined that the grievant was the least senior MHS teacher employed in the social studies field; he was provided notice per W.Va. Code §18A-2-2, that his employment was to be terminated for lack of need. The grievant requested and was granted a hearing before the Board. Since he held only certification in social studies, grades 7 through 12, the provisions of Code §18A-4-7a which permit movement or "bumping" into positions held by less senior employees in other certification fields, (See footnote 4) were inapplicable. The Board approved the termination ofthe grievant's employment; he served as a substitute during the 1992-93 school year and acquired his current position in August 1993.

Susan Alvis, a five-year Oakvale Elementary School teacher certified in multi-subjects, grades, Kindergarten through 8 and Social Studies 7 through 12, was also given notice that she would lose her job in the RIF. The termination of Ms. Alvis' contract was based on the conclusion that she was the least senior kindergarten teacher in the school system. At that time, pursuant to an opinion of the State Superintendent of Schools and decisions of the Education and State Employees Grievance Board, professional employees who voluntarily terminated their employment with a county board of education and were re-employed at a later date, could “recapture” seniority accrued during the earlier employment term. Their seniority, for all purposes, was equal to the total length of their employment with the county board, regardless of whether there were breaks in that employment.

In Triggs. V. Berkeley County Bd. of Educ., 420 S.E.2d 260 (W.Va. 1992), the West Virginia Supreme Court of Appeals interpreted the pertinent portions Code §18A-4-7a to mean thatseniority was lost when there was a voluntary break in service. The decision, issued April 2, 1992, had significant ramifications; seniority lists, upon which reductions in force and other personnel actions are based, were suddenly revised. Since W.Va. Code §18A-2- 2 mandates that notice be given by April 1, to those employees whose employment is to be terminated in a reduction in force, the process for Spring 1992 reductions had begun.

Shortly after learning of the decision, the Board recalculated the seniority of the employees involved in its reduction in force consistent with the Court's findings; the review indicated at least one kindergarten teacher in the school system with less seniority than Ms. Alvis. Ms. Alvis' notice of termination was rescinded. Because the statutory deadlines for notifying the less senior employee of a termination had passed, Board administrators concluded that his or her position could not be

"opened" for Ms. Alvis, and that it would be necessary to create a position for her. The reconfiguration of the seniority lists did not indicate other employees in the social studies field with less seniority than the grievant.

On or about April 9, 1992, Ms. Alvis was notified that during the 1992-93 school year, she would be assigned to teach kindergarten classes at Bramwell Middle School (BMS) for one-half of the school day and social studies classes at MHS for the remainder of the day. This position was not posted.

On May 15, 1992, after consideration of the appellant's petition for rehearing and amicus curiae briefs, the Court issueda modified decision in Triggs which made it clear that the holdings therein were prospective, and that employees who had been previously credited with "broken seniority" would retain it. Id. at 14. Apparently, the Board did not make further adjustments in its reduction-in-force.

Argument

The grievant asserts that the creation of the one-half time social studies assignment at MHS conclusively establishes that the Board acted arbitrarily and/or relied on inaccurate data in initially determining that there was a lack of need for his services there. The grievant contends that he should have been retained at the school on a half-time basis; (See footnote 5) he seeks the difference between the pay received for his substitute work during the 1992-93 school year and the amount he would have earned at MHS. (See footnote 6)

The Board maintains that there was a lack of need for the grievant's MHS position when the reduction-in-force was implemented, and that Ms. Alvis was placed at the school solely because of the anomaly created by Triggs. For the reasonsdiscussed below, the undersigned concludes that the grievant has failed to show any wrongdoing on the Board's part.

Findings and Conclusions

The evidence in the case reflects rather clearly that the Board conducted a thorough and accurate review of its staffing patterns and student enrollment and properly concluded that MHS could lose a position and still maintain an adequate social studies department. The grievant presented no evidence which even suggests that the Board's initial calculations were erroneous and Ms. Alvis' subsequent assignment to MHS, in and of itself, will not support that they were.

Moreover, the evidence reveals that Ms. Alvis' placement at MHS was related to the school's staffing needs only to the extent that her assignment there would be a more efficient use of her services than a placement at another school. The record as a whole establishes that it was the timing of Triggs which caused the Board to create the position; it appears that the post was a “bonus” for MHS.

It is questionable whether Triggs imposed a legal duty upon the Board to rescind any portion of its reduction-in-force. It is not necessary, however, to find a duty in order to find that the Board did not act arbitrarily or capriciously. It was reasonable for Board administrators to conclude that the decision may have created an obligation to retain Ms. Alvis and then act accordingly. See, Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995). The record also suggests that notions of fairnesswere at least part of the Board's motivation. There is no evidence whatsoever that the grievant's termination was manipulated so that Ms. Alvis could be awarded one-half of his former position.

Finally, even though the grievant does not raise the issue, the undersigned finds that since the unusual circumstances caused by the April 1992 release of Triggs prompted the creation of the MHS/BMS position, and it was created solely for Ms. Alvis, it was not necessary to post the position per W.Va. Code §18A-4-7a, ¶10. County boards of education are not required to take personnel actions which are futile and/or would be of no benefit to employees. See, Webb v. Mason County Bd. of Educ., Docket No. 26- 89-004 (May 1, 1989).

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 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 16, 1996

Footnote: 1

The grievant's appeal to Level IV specified that a decision could be made on the record developed at the lower levels. The parties were subsequently advised to forward the record and proposed findings of fact and conclusions of law by August 17, 1992. The Board submitted the record and its proposals by that date; the grievant did not submit proposals.

On or about December 4, 1992, Donald Pitts, Esquire, advised the undersigned that he had been retained by the grievant and that his client desired a Level IV hearing. Mr. Pitts represented that his client was under the impression that he had attached a requestfor a hearing to his Level IV appeal. Subsequent to a conference call with Mr. Pitts and counsel for the Board, the undersigned granted the request, primarily because the record made below was inadequate for a reasoned inquiry into the grievant's claims.

Footnote: 2

During the previous hearings, the grievant's legal position often shifted abruptly and was generally unclear. Understandably, the presentation of evidence was, therefore, largely unfocused. The record which was ultimately developed did not contain information on several key points; the undersigned, through correspondence, asked the parties to submit additional documentary evidence and/or submit stipulations of fact on those matters. The supplemental hearing was convened when it appeared that this approach would be unsuccessful.

It is also noted that during the supplemental hearing on October 10, 1995, the conduct of Donald Pitts, the grievant's counsel, was such that the proceedings were ended abruptly. The parties were subsequently advised that the Education and State Employees Grievance Board would petition the Raleigh County Circuit to hold Mr. Pitts in contempt of an administrative agency. Ultimately, the agency declined to take such action.

Footnote: 3

Mr. Mattern also concluded that MHS could lose a one-half time positions in science and that its assistant principal could assume teaching duties on a part-time basis. These changes were also implemented effective the beginning of the 1992-93 school year.

Footnote: 4

The pertinent part of the statute provides,

> *Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [§ 18A-2-2], article two of this chapter. . .Provided, however, That an employeesubject to release shall be employed in any other professional position where such employee is certified and was any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure.*

Footnote: 5

As previously noted, the grievance was filed in March 1992. The original complaint obviously could not address the reemployment of Ms. Alvis' in April 1992. Since the initial filing was broadly worded and included the statement, "[o]ther

less senior teachers not terminated," the grievant was essentially permitted to amend the complaint to encompass the Board's actions regarding Ms. Alvis.

Footnote: 6

It is not at all clear that the grievant would be due any additional compensation. The evidence reflects that he may have earned more as a substitute than he would have made as a one-half time instructor at MHS.