DONALD BURROWS,

Grievant,

v. DOCKET NO. 96-54-281

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Donald Burrows, filed this grievance directly at level four on July 5, 1996, as follows:

> Grievant, a regularly-employed custodian, asserts that he has been dismissed from his employment. Grievant alleges a violation of West Virginia Code §18A-2-8 and 18A-2-8a and requests reinstatement to employment as a custodian, retroactive wages, benefits, and seniority.

Hearing was held on September 9, 1996, and this case became mature for decision on October 4, 1996, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

Based upon the evidence presented at level four, and the transcript and exhibits from Grievant's personnel hearing before Respondent on July 26, 1996, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant was a probationary employee of Respondent Wood County Board of Education, first regularly employed as a Custodian during the 1994-95 school year. He continued in that capacity during the 1995-96 school year.

2. Grievant was injured on the job on the first day of work in the 1995-96 school year. He filed a Workers' Compensation claim and the injury was held to be compensable. Grievant was awarded total temporary disability (TTD) benefits through the first few months of 1996.

3. Grievant was given an unconditional return to work slip by his physician, Alfonso Morales, M.D., on March 26, 1996. Despite Dr. Morales' authorization for Grievant to return to work, Grievant

did not feel he was able to perform the full functions of his job and did not return to work.

4. Grievant did not contact Respondent regarding his status although he knew Dr. Morales sent the return to work notice to Respondent.

5. Grievant was also receiving treatment from a chiropractor, W.Z. Johnson, who provided Grievant a return to work with light duty restrictions on March 20, 1996, through July 1, 1996. Grievant knew from previous experience that Respondent did not permit employees to return to work on a light duty basis.

6. Shortly after receiving the return to work slip from Dr. Morales, Grievant began receiving additional payments from Workers' Compensation. Grievant believed these payments were TTD benefits, when in actuality they constituted Grievant'spermanent partial disability (PPD) award. Grievant assumed he was still "on compensation" during the period April, May, and June 1996.

7. Grievant did not report to Respondent regarding his status during the time period between March 26, 1996, and the end of the 1995-96 school year.

9. Grievant performed a few minor contracting jobs for remuneration in March 1996, and also worked around his house every day, "mowing grass or something." P.Tr., 32. (See footnote 1) Grievant knew at that time that he was seen working by his school supervisor, Jim Hall, yet still failed to contact him regarding his work status.

10. Respondent did not renew Grievant's probationary contract of employment at its April 30, 1996 meeting. Superintendent Curry informed Grievant of this by letter dated May 6, 1996. Grievant requested a hearing which was held on June 26, 1996. After the hearing, Respondent upheld its earlier action.

Discussion

Grievant alleges the Board violated W. Va. Code §§ 18A-2-8 and 18A-2-8a by not renewing his probationary contract of employment for the 1996-97 school year. Grievant contends that Respondent's rationale for not renewing his probationary contract was disciplinary in nature, and thus, the provisions of W. Va. Code § 18A-2-8 must be followed, rather than the provisions of W. Va. Code § 18A-2-8a. Respondent does not deny that Grievant's contract was not renewed because of his failure to report or return to work following his release from his physician. W. Va. Code § 18A-2-8a provides, in pertinent part:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. . . . The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five [§§ 18A-2-4, repealed and 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for hiring.
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> Any . . . other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

This section does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees. If requested by the affected employee, Respondent is required to provide a reason for the nonrenewal and a hearing. Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (W. Va. 1993). Further, the import of the above language and the rights in general of probationary employees who receive notice of termination were extensively discussed in Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). Specifically, the case held that a county board of education may not refuse to rehire a probationary employee for "just any, or no, cause," but that the board need not do more than afford the employee a "full and complete hearing which supports" that the reasons for the action are "substantive." There is no "for cause" standard in cases involving a Board's decision to terminate a probationary employee's employment perCode § 18A-2-8a. Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995).

Grievant argues that Cordray, supra., is contrary to the statutory language of W. Va. Code § 18A-2-8, and asserts that his conduct must be characterized as willful neglect of duty and insubordination, and Code § 18A-2-8 provides the exclusive remedy for dismissing an employee on those grounds, as set forth in Greene v. Bd. of Educ., 133 W. Va. 356, 56 S.E.2d 100 (1949). Grievant asks that the undersigned overrule this Grievance Board's prior decision in Cordray.

The West Virginia Supreme Court's holding in Greene, supra, is inapplicable to the instant case. That case dealt with the dismissal, for cause, of a classroom teacher who held a continuing contract of employment, and the Supreme Court held that the provisions of W. Va. Code § 18A-2-8 must be utilized when dismissing an employee with a continuing contract of employment for cause. The

instant case deals with a service employee dismissed under a probationary contract of employment. The Administrative Law Judge in Cordray declined to extend additional rights beyond those provided for in W. Va. Code § 18A-2-8a to probationary employees. The Supreme Court, in Miller, supra, noted that while no affirmative action was required by the board when not rehiring a probationary employee,

> [f]ailure to renew a probationary teacher's employment contract is an administrative act that entitles the teacher to a grievance procedure hearing, where such procedure has been adopted by the employer board of education and made applicable to all school employees. The fact that the procedure may be generous beyond statutory or constitutional requirements does not preclude the teacher from availing himself of the rights provided by the procedure. (Emphasis added).

Thus, the Supreme Court has recognized that probationary employees are not entitled to the same statutory and due process rights as employees who possess continuing contracts of employment. Therefore, the undersigned declines Grievant's offer to overrule Cordray and its progeny and finds that Grievant was correctly dismissed under the provisions of W. Va. Code § 18A-2-8a. Further, the facts as set forth in the above findings provide ample evidence that Grievant refused to return to work and failed to contact Respondent regarding his status, and that Grievant undertook other employment for pay while maintaining that he could not work for Respondent due to his on-the-job injury. Respondent has proven with ample justification its reasons for not renewing Grievant's probationary contract of employment for the 1996-97 school year.

Conclusions of Law

1. When a probationary service employee's contract is not renewed, a county board of education must meet the mandates of W. Va. Code § 18A-2-8a. Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

2. A probationary employee is entitled to a statement of reasons for his contract's nonrenewal, and a hearing thereon, only after-the-fact and upon his request. See W. Va. Code § 18A-2-8a; Cordray, supra.

3. W. Va. Code § 18A-2-8a does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees, other than notifying the employees that they will not be rehired, and if requested, providing a reason for the nonrenewal and a hearing. Miller v. Bd. of Educ., 190 W. Va. 153, 437 S.E.2d 591 (W. Va.

1993). 4. The evidence presented provides ample justification for Respondent's decision not to renew Grievant's probationary contract of employment pursuant to the provisions of W. Va. Code § 18A-2-8a.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: October 24, 1996

Footnote: 1

References to the Personnel Hearing before the Board of Education held on June 26, 1996, will be "P.Tr., ___."