PATRICIA LOVE, et al.

v. Docket No. 95-33-454

MCDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievants, Patricia Love, Gary Brown, Yvonne Brown, Michael Yeabower and Frannie Whanger lost their teaching positions in a reduction-in-force of professional personnel conducted by the McDowell County Board of Education (Board) in the spring of 1995. They make the following claim at Level IV. (See footnote 1)

> Grievants were terminated, not because of a loss of student population but more directly, because of a failure of the Board of Education, particularly in the Special Education Department, to comply with state and federal guidelines with regards to the evaluation, testing and placement of special education referrals andspecial education students and that that failure resulted in a loss of student population in that each of those individuals who are in special education are counted on what they call, what is basically, a three for one, but for each of those special ed. students being properly evaluated, tested and placed, that there would not have been a loss and, therefore, no need for a reduction in force and these grievants would not have been terminated.

It is undisputed that in October 1994, the Board reported to the West Virginia Department of Education (DOE) that during the preceding twelve months, the school system's student population had declined. It is also undisputed that DOE advised the Board in January 1995, that because of the decline, the Board would receive state funding for 35 fewer professional positions for the 1995-96 school year than had been funded in the 1994-95 year.

In determining its total student population for the reporting period, DOE regulations permitted the Board to count its "special education" (See footnote 2) students three times. A student receives the designation through what appears to be a complex and lengthy referral and testing process. Thereafter, the pupil must have "current" education plans on file and must undergo a three-year reevaluation which is essentially the same as the initial assessment. Students who have been

referred for special education services but have not completed the testing process by the end of a particular reporting period are not eligible for the additional count for that period. A pupil who is scheduled for but has notreceived a reevaluation by the end of the period is also ineligible. (See footnote 3)

DOE and the United States Department of Education (See footnote 4) have promulgated regulations which define the various facets of the assessment process by which a student achieves and maintains "special education" status. The Board has established its own practices for the day-to-day implementation of the regulations. The regulations, and, to some extent, the Board's practices, impose time lines for the completion of certain phases of the assessment. These time lines do not address or necessarily coincide with DOE's funding-related reporting periods.

The record establishes with reasonable certainty that there were approximately 156 students in the school system in various phases of the referral, testing, or reevaluation process during the relevant reporting period. There is no dispute that had the process been completed for these students by the end of the period, they would have been eligible for the triple count.

The grievants' legal position is difficult to discern. They do not dispute and the record supports that they were properly identified as the least senior instructors then teaching in certification fields properly targeted in the reduction-in-force, and that they were provided the protections of W.Va. Code §18A-2-2. (See footnote 5) The above statement of their claim indicates that a "failure" on the Board's part to comply with state and federal regulations cost them their positions, but does not specify a particular regulation. (See footnote 6)

Moreover, the presentation of evidence at Level II was not focused on the regulations and suggests that the grievants were proceeding on the more general theory that the Board's Special Education Department had not processed all referrals, tests, and reevaluations efficiently during the pertinent reporting period and that it was this inefficiency which caused their lay-offs. Because the evidence does not establish any wrongdoing on the Board's part, it is not necessary to resolve the ambiguities of the grievants' claims or further characterize their position.

There is evidence of record which suggests that the Board did not comply with state and federal time lines for completion of certain portions of the assessment process for some of the 156 students identified. Not surprisingly, the record also reflects that a multitude of factors contributed to the "failure" to obtaina triple count for those students, including the unexpected illness of a speech

pathologist, the practical and logistical problems of scheduling tests and transporting students to the test area(s), past, substantial reductions in the Board's central office staff responsible for special education services, the failure of teachers and school principals to conform to the referral process, and significant increases in the number of referrals made for special education services over the last several years.

There is no evidence of record that any of the Board employees responsible for the operation of its special education program was negligent or inefficient in performing any duties associated with the referral or testing process. Moreover, even if the evidence sufficiently demonstrated a degree of negligence or the failure to comply with the time lines for certain students were deemed per se negligent, there would be no legal basis for awarding the grievants' reinstatement as a remedy. Simply stated, there was no causal link between the failure to comply and the termination of the grievants' employment.

Finally, the grievants presented no evidence whatsoever which even tends to show that had the Board been able to count all 156 students three times, they would have retained their positions. It can be assumed that the additional population would have resulted in some additional retention, but the record is nearly devoid of information on the issue of which of the thirty-five professionals terminated in the reduction-in-force might still have lost theirpositions. It would be mere speculation to conclude that a readjustment in figures would have benefitted only the grievants.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell 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: February 29, 1996

Footnote: 1

The grievants filed their complaints individually at Level I on or about April 25, 1995. Their supervisors were without authority to grant relief and the grievances were consolidated at a Level II hearing held June 8 and September 5, 1995. The Level II evaluator found the grievants' claims unsubstantiated and the Board, at Level III, ultimately affirmed his conclusions. Appeal to Level IV was made October 16, 1995. The parties subsequently agreed that a decision could be rendered on the lower level record. Although the parties were given until November 30, 1995 to submit proposed findings of fact and conclusions of law, none were received. The grievants' legal position, as set forth herein, is taken from their counsel's opening remarks at the Level II hearing. As discussed herein, their position is unclear.

Footnote: 2

While the record does not provide a precise definition of this term, it appears that it encompasses mentally, physically, and behaviorally impaired students and may in some cases be used in reference to gifted pupils.

Footnote: 3

Obviously, the student would be ineligible if the reevaluation had been completed and indicated that services were no longer needed.

Footnote: 4

The Board's special education program is partially federally funded.

Footnote: 5

W.Va. Code §18A-4-7a, ¶6, provides that "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 [W.Va. Code §18A-2-2]." Code §18A-2-2 specifies that the employee must receive the notification and the opportunity for a board hearing on the matter prior to April 1 of the then current year.

Footnote: 6

Indeed, the grievants did not produce the regulations at the Level II hearing. The discussion herein on the contents of the regulations is based on the limited and often unclear testimony of witnesses familiar with them. Fortunately, resolution of the case does not require more specific findings on the issue.