LORETTA DIAL

v.

Docket No. 96-33-259

MCDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Loretta Dial, is employed by the McDowell County Board of Education (Board), as an Aide. She filed a grievance at Level I, in late March or early April, 1996, protesting the Board's decision to transfer her from Big Creek High School (BCHS) effective the end of the 1995-96 school year. Her supervisor was without authority to grant relief, and the grievance was denied at Level II, following a June 5, 1996 hearing. (See footnote 1) The Board waived consideration of the matter at Level III, and appeal to Level IV was made June 21, 1996. A hearing was held September 20, 1996, and the parties submitted proposed findings of fact and conclusions of law by October 24, 1996.

Background

There is essentially no dispute over the facts of the case. During the 1995-96 school year, the grievant was one of three special education Aides assigned to BCHS. She was the second most senior of the three, and the only one holding a “split” position, i.e., she assisted with both Mentally Impaired (MI) and Learning Disabled (LD) students, and the remaining Aides were assigned to one or the other. In Spring 1996, Superintendent of Schools Kenneth Roberts and his staff determined that, in order to adjust to the latest reductions in state funding, it would be necessary to eliminate approximately sixteen service positions, including the grievant's BCHS post, effective the end of the 1995-96 school year. With fourteen year's seniority, the grievant avoided termination. (See footnote 2)

Believing that it was not necessary, legally or otherwise, to reassign either of the other two BCHS

Aides, Superintendent Roberts gave the grievant a March 7, 1996 notice advising that he would recommend that she be placed on a transfer list for reassignment during the 1996-97 school year. The notice provided the following reasons:

> Upon reviewing the educational program for McDowell County Schools, it has become necessary to make adjustments among the personnel.
>
> . . .
>
> This [recommendation of transfer] to the Board of Education is due to the reduction-in-force created by the financial need to reduce staff to the State Aid Formula for service personnel, budget reductions, and the loss of student enrollment.

The grievant requested and was granted a hearing on the proposal. The Board subsequently voted to accept the Superintendent's recommendations on the elimination of positions and the grievant's placement on the transfer list.

Argument

The grievant first asserts that the Board “erred in that the stated justification for the transfer disappeared prior to the close of the 1995-96 school year.” She “additionally asserts a violation of W.Va. Code §18A-4-8g, and contends that [the transfer] was otherwise arbitrary and capricious.” The Board claims broad discretion in transfer matters and maintains that the grievant made no showing that it acted arbitrarily or contrary to statute.

Findings and Conclusions

Through an extensive and necessarily complex examination of Clinton Henry, the Board's Director of Special Education, the grievant attempted to show that the calculations used for projecting student enrollment in the BCHS special education program for school year 1996-97, were miscalculated, flawed, and/or contrary to West Virginia Department of Education regulations. Apparently, the evidence was offered to show that the reasons given for the transfer were false or did not materialize, and that the grievant should, therefore, be restored to her former post. She succeeded only in showing that there were 100 special education students enrolled in the program on September 16, 1996, and that in February orMarch 1996, and perhaps earlier, Mr. Henry had predicted that there would be 98. (See footnote 3)

The grievant's reasoning on this portion of the grievance is, in any event, unsound. The assertion that she could show entitlement to reinstatement simply by showing inconsistency or errors in the predictions for BCHS ignores that a reduction-in-force and subsequent transfers are conducted countywide, and that the decision to eliminate a certain position at a particular school is not an isolated one. Whether it is feasible to retain or eliminate one post at one school may be dependent upon whether the need for positions, in the same or different classifications, at other schools is greater or less. Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995).

Aside from establishing that her position and not the grievant personally, was targeted in the reduction-in-force, Superintendent Roberts' Level II testimony confirms that he was taking a number of variables into account when determining which positions were to be eliminated. As examples, he related that the unexpected resignation of two employees played a role in who would be retained and where, and that several bus operators were retained but with shortened contract terms. It is quite clear from the Superintendent'stestimony and his March 7 notice to the grievant, that her transfer was part of a larger process; the reasons listed in the notice were not confined to BCHS enrollment figures.

Superintendent Roberts' testimony further establishes that he relied on Mr. Henry's calculations in determining that it was more feasible to eliminate the grievant's BCHS position than the remaining Aide positions. It appears that at least part of his reasoning was that since the grievant's position had been added to the BCHS two years prior, to handle an overload of special education students, and that overload had been resolved at the time the reduction-in-force was initiated or would be resolved by the beginning of the 1996-97 school year, there was no or less need for the position.

It is more important, however, that the grievant's claim and, to some extent, even the Board's position are based on erroneous legal and/or factual assumptions. Neither can seriously contend that when the state withdrew funds for sixteen service personnel posts, there was suddenly a lack of need for the services of the employees who held them. There is no dispute that the elimination of the grievant's position and her subsequent transfer were triggered by operation of W.Va. Code §18-9A-5a, which provides a personnel-pupil ratio method for reducing the salary and benefit funds appropriated to county boards of education. The method seems unrealistic to the extent that it presumes that a county board's workload is always directly proportionate to the number of students it serves.

It is clear that when Superintendent Roberts and his staff determined that the grievant's position could be eliminated, they were responding to a lack of funds and not a true lack of need for her services. Since the Board had no control over the cutback in funds,its discretion in the reduction-in-force was limited to deciding which positions were the most or least expendable.

The parties' positions also incorrectly assume that county boards of education are under a statutory duty to eliminate service personnel positions only when the demand for services actually decreases. Unlike W.Va. Code §18A-4-7a, which specifically addresses a “lack of need” for professional personnel, W.Va. Code §18A-4-8b does not define what may or may not trigger a reduction-in-force of service employees. It merely provides that seniority should be determinative of which employees will be terminated “[s]hould a county board of education be required to reduce the number of employees within a particular job classification.” Clearly, the reduction in state funds placed a requirement on the Board to reduce its payroll.

It is the mistaken belief that boards can only cut positions when there is no longer a need for them which apparently causes administrators to make inaccurate references, generally or specifically, to a lack of need when advising employees of the reasons for their termination or transfer. The testimony of Mr. Henry and even Superintendent Roberts suggests that they were under the impression that in order to defend their decision to eliminate the grievant's position, they had to show a lack of need at BCHS and/or the school system as a whole.

Moreover, to conclude that county boards have an obligation, under statute or other legal theory, to look to need rather than financial realities when implementing a reduction-in- force, would, in effect, mean that boards could never base a reduction on a decrease in statefunding. Simply stated, if a board has such a duty, a loss of funds and its unavoidable effects on staff size would override it.

It is, therefore, doubtful that any employee whose transfer was triggered by a reduction-in-force can successfully prosecute a “lack of justification” claim simply by showing that there was no lack of need for his services at the particular school from which he was transferred. The employee must necessarily acknowledge the true underlying reason for the action, and show that the board erred or otherwise abused its discretion in deciding which terminations and/or reassignments were the most reasonable. Since, as discussed, these decisions often, if not always, involve numerous variables and subjective, countywide assessments of staffing patterns, the employee's burden, at least from an evidentiary standpoint, would be a difficult one. See generally, Travis v. Health and Human

Resources, Docket No. 95-HHR-359 (March 24, 1997). In the present case, the grievant's evidence falls well short of substantiating any such claims.

The grievant's remaining contention is based on the following portion of W.Va. Code §18A-4-8g:

> 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 article: 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.

Citing Strickland v. Kanawha County Bd. of Educ., Docket No. 95-20-189 (Aug. 8, 1995), the grievant asserts that it was contrary to these provisions to transfer her and retainthe less senior MI Aide at BCHS. It is more accurate, or at least clearer, to say that the grievant construes the above provisions to preclude a county board of education from looking to obvious and necessary variances in the duties of employees in the same classification at the same school when determining which, if any, of their positions, can be eliminated. Under the grievant's interpretation, a board could not reach the question of whether a new configuration of positions at a particular school would adequately serve students, without first determining whether the seniority of the employees would permit it. This proposition is directly contrary to the holding in Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 599 (W.Va. 1986), that county boards have “broad discretion in personnel matters.” Since the statute addresses seniority and, therefore, competing interests among employees, the general rule in Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), that “school laws should be strictly construed in the favor of the employee,” seems inapplicable.

In any event, Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997), overruled Strickland, to the extent that it held that W.Va. Code §18A-4-8g was susceptible to the grievant's interpretation. Wellman, supra, which, in many respects, is similar to the present case, was cited and affirmed.

In summary, a preponderance of the evidence establishes that the Board had no choice but to eliminate sixteen service personnel positions, and that it examined staffing patterns at all schools to determine the relative need for positions, and properly determined that the grievant's BCHS post was one of the most expendable. The grievant has failed to show that the transfer was contrary to Code

18A-4-8g, or that it was accomplished in a manner and for reasons which were arbitrary or capricious. 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: April 30, 1997

Footnote: 1

The transcript of this proceeding and exhibits entered, are part of the record herein.

Footnote: 2

W.Va. Code 18A-4-8b, discussed infra, requires that reductions-in-force of service personnel be based on the seniority of all employees in the school system in particular classifications; there is no "school" seniority. Brewster v. Logan County Bd. of Educ., Docket No. 22-87-081-1 (Dec. 1, 1987). The parties do not dispute that the sixteen employees who ultimately lost their jobs were the least senior in their classifications.

Footnote: 3

Obviously, since the complaint was filed in March 1996, the grievant, like the Board, did not then have September records. The undersigned permitted the grievant to amend the complaint at the Level IV hearing to encompass the "justification" claim. At the lower levels, her arguments were confined solely to W.Va. Code §18A-4-8g. The Board, through counsel, represented that it could defend against the new contention, but stressed that because of the timelines imposed by statutes on reductions-in-force and transfers, Mr. Henry was required to speculate in the Spring on how many students might be enrolled in the fall in what can be a fluctuating program, and that the evidence should otherwise be reviewed from his perspective. Ultimately, Mr. Henry's testimony provided little, if any, support for the grievant's claims.