REBECCA ECKENRODE,

Grievant,

v.

DOCKET NO. 96-20-302

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rebecca Eckenrode, filed the following grievance on May 9, 1996:

> Grievant is regularly-employed as a cook. Respondent transferred Grievant rather than a less senior Cook at Grievant's school in violation of West Virginia Code §18A-4-8b and their own policy. Grievant seeks reinstatement to her position.

Following a hearing on June 24, 1996, a level two decision was rendered on July 9, 1996, denying the grievance. Grievant appealed to level four on July 18, 1996, and this case was submitted on the record developed below. 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.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant was employed during the 1995-96 school year as a half-day (.5) Cook I at Andrew Jackson Middle School.

2. Due to a decline in participation in the school's food service program, it was determined pursuant to food service staffing regulations that a half-day Cook I position would be eliminated at the school effective the 1996-97 school year.

3. The hot lunch program at Andrew Jackson Middle School employed the following individuals

during the 1995-96 school year: Grievant - ½ time Cook I 3 years seniority

Charlotte Lucy - Full-time Cafeteria Manager 2 years seniority

Paula Seabolt - Full-time Cook III 1-1/2 years seniority

Debra Humphreys - Full-time Cook II 7 years seniority

Nora Holley - Full-time Cook I 2 years seniority

4. Grievant received notice of transfer pursuant to W. Va. Code § 18A-2-7. She requested a hearing before Respondent. After the hearing she was placed on the transfer list.

Discussion

Grievant contends she was improperly transferred because she was not the least senior employee at Andrew Jackson Middle School within the cook classification category of employment. Grievant had more seniority than Nora Holley, Cook I, and Paula Seabolt, Cook III. Grievant relies upon Respondent's Transfer Policy 35.00 and this Board's decision in Strickland v. Kanawha County Bd. of Educ., Docket No. 95-20-189 (Aug. 8, 1995) to support her position. Respondent argues that it correctly followed Policy 35.00, and that Grievant's reliance on Strickland is misplaced.

In the instant case, Respondent determined that it needed to reduce the number of cooks at Andrew Jackson Middle School from 4.5 to 4, necessitating that a half-time position be cut. Grievant held the only half-time cook position at Andrew Jackson Middle School, and thus was transferred.

In Strickland, the grievant, a Custodian I, was placed on the transfer list, while other Custodians with higher classifications but less seniority, were retained at his school. This Administrative Law Judge held that the grievant's transfer was a violation of the seniority provisions of W. Va. Code §§ 18A-4-8b, 18A-4-8e and 18A-4-8g, stating that "[f]or all purposes, including the filling of vacancies and reduction in force, Custodian I, II, III and IV is considered one classification category of employment." Thus, even though Custodian I positions at that particular school were identified to be reduced in Strickland, because all Custodian categories are considered one classification category of employment, the undersigned held it was improper to transfer grievant Strickland, who was not the least senior Custodian at his particular school.

The Cook classification categories of employment are also considered one classification category of employment for purposes of filling vacancies and reducing in force. See W. Va. Code §§ 18A-4-

8b, 18A-4-8e, 18A-4-8g. (See footnote 1) Grievant, with 3 years seniority, had more seniority than Nora Holley, Cook I, with 2 years seniority, and Paula Seabolt, Cook III, with 1-½ years seniority. Therefore, if one follows Strickland, supra, Grievant was wrongfully slated for transfer when there were at least two other individuals in the Cook classification category of employment at her school with less seniority.

However, upon a review of Strickland, the applicable statutes and case law, the undersigned concludes that her holding in Conclusion of Law No. 3 of Strickland wasclearly wrong and for the following reasons is hereby overruled. In Strickland, as in the instant case, the grievant was transferred, not reduced-in-force. Transfers of school service personnel are governed by W. Va. Code § 18A-2-7, which provides, in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . .

The power to transfer employees must be exercised reasonably and in the bests interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Board of Education, 166 W.Va. 363, 275 S.E.2d 908 (1980). Nothing in Code § 18A-2-7, nor anywhere else in that chapter, however, speaks to the use of seniority as a basis in determining which employees shall be transferred.

Further, this Grievance Board has consistently rejected the notion that W. Va. Code § 18A-4-8b mandates that transfers necessitated by a reduction-in-force be based on seniority. See, e.g., Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327/300 (Nov. 30, 1995); Gonzales v. Harrison County Bd. of Educ., 91-17-227 (Dec. 31, 1991); Norman v. Greenbrier County Bd. of Educ., Docket No. 90-13-345 (Nov. 30, 1990); McClure v. Kanawha County Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988). While that statute provides that "[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided," the remaining language makes no mention of transfers. See, Wellman, supra.

This ALJ decided in Strickland, that the following language in Code § 18A-4-8g (enacted in 1993 andamended in 1994) mandated that seniority was also to be a determinative factor in transfers of school service employees:

> 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. (Emphasis added).

Code § 18A-4-8e, dealing with competency testing for service personnel, provides, in pertinent part:

> Each classification title defined and listed shall be considered a separate classification category of employment for service personnel and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. (Emphasis added).

. . .

> Once an employee passes the competency test of a classification title, said applicable shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [18A-4-8b] of this article and shall not be required to take the competency test again.

Based upon a reading of the above statutes, in pari materia, the undersigned concluded in Strickland that the Grievant, a Custodian I, was not the least senior employee within the custodial classification category of employment, and that the provision above that, "[f]or all purposes including the filling of vacancies and reduction in force, . . .", also applied to transfer actions, thus, the grievant had erroneously been slated for transfer over a least senior employee within the custodial classification category of employment. The undersigned concludes that she was clearly wrong in holding that seniority was to be used as a basis for determining transfer actions involving school service employees. First, had the Legislature intended that seniority have a role in deciding transfer actions, it had the opportunity to clearly and unambiguously include transfers into the language of Code § 18A-4-8g when it enacted it in 1993, or amended it in 1994. The language in Code § 18A-4-8g quoted above does not explicitly state that transfers are to be based on seniority. Further, the Legislature could have inserted such a mandate into Code § 18A- 2-7. It must be concluded that had the Legislature wished to restrict the authority of a county board of education in transfer actions, it

would have done so. See Haynes v. Putnam County Bd. of Educ., Docket No. 91-40-073 (July 10, 1991).

Second, the language of Code § 18A-4-8g, when discussing classification categories of employment and how they are to be determined, clearly and unambiguously states 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", and that "[t]he particular classification title held by an employee within the classification category shall not be taken into consideration when implementing a reduction in force." (Emphasis added).

In both Strickland and the instant case, the grievants were not subjects of a reduction in force, but were transferred. Thus, the language and the statutes cited for authority in Strickland, i.e., Code §§ 18A-4-8b, 18A-4-8e, and 18A-4-8g, simply are not applicable. To the extent Strickland holds that seniority of school service personnel, as determined by Code §§ 18A-4-8b, 18A-4-8e and 18A-4-8g, is to be used in making decisions regarding transfers under Code § 18A-2-7, it is hereby overruled. The remaining issue, then, is whether the Board violated section 35.02 of its transfer policy. The undersigned concludes that it does not. Kanawha County Schools Administrative Regulation 35.00 provides as follows:

> A35.01 Reduction -- If a determination is made to reduce a service position from a school, the employee assigned to the position to be reduced shall be recommended for transfer. For example, if a half-time kindergarten aide position is recommended to be reduced for the next ensuing school year, the aide currently assigned to the position will be recommended for transfer.

> A35.02 Seniority -- Seniority will only be a factor when a reduction is recommended where two or more service personnel are employed in equivalent positions, in which case the least senior employee will be recommended for transfer. For example, if a full-time Custodian I position is recommended to be reduced for the next ensuing school year and the school currently has three full-time Custodians I, the least senior full-time Custodian I will be recommended for transfer. Seniority will be determined by the date service commenced within the county within a classification, less any time away from work due to reduction in force, resignation, or a leave of absence not related to a compensable on-the-job injury.

Grievant alleges that the board has violated section 35.02 of its transfer policy, because she was not the only Cook I at Andrew Jackson Middle School, and was not the least senior Cook I. According to the board's policy, if there are two or more service personnel employed in equivalent

positions, the least senior employee will be recommended for transfer. However, Grievant did not hold an equivalent position with Ms. Holley, the other Cook I, for purposes of the transfer policy. While Grievant's classification category of employment, Cook I, was the same as Ms. Holley's, her position was not. She was employed in a half-time position, while Ms. Holley possessed a full-time position. Therefore, it was not arbitrary and capricious, nor in violation of its policy, for the board to identify Grievant for transfer at the end of the 1995-96 school year.

Conclusions of Law

1. To the extent this Grievance Board's decision in Strickland v. Kanawha County Bd. of Educ., Docket No. 95-20-189 (Aug. 8, 1995), holds that transfers of school service employees must be determined on the basis of seniority, pursuant to the applicable provisions of W. Va. Code §§ 18A-4-8b, 18A-4-8e, and 18A-4-8g, it is hereby overruled.

2. No statutory limitations have been placed on the superintendent's authority to transfer school personnel. The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex. rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); see also, Wellman v. Mercer County Bd. of Educ., Docket No. 95-27- 327/300 (Nov. 30, 1995).

3. The Board's transfer Policy 35.00 does not place any further restrictions on the superintendent's authority to transfer school service employees, except to the extent that it mandates when a reduction is recommended where two or more service personnel are employed in equivalent positions, the least senior employee will be recommended for transfer.

4. Grievant, as a half-time employee, does not hold an equivalent position to a full-time service employee who holds the same classification category of employment.

5. The Board did not violate W. Va. .Code § 18A-4-8g or its transfer policy in recommending Grievant for transfer.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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: January 22, 1997

Footnote: 1

Contrary to Grievant's assertion, the undersigned does not find that the Cafeteria Manager classification is a part of the Cook classification category of employment. It is defined separately from the Cook series in W. Va. Code § 18A-4-8 and is not designated by a Roman numeral as set forth in Code §§ 18A-4-8e and 18A-4-8g. Therefore, Charlotte Lucy, the full-time Cafeteria Manager, with 2 years seniority, is not affected by this decision.