BEVERLEY ROGERS,

Grievant,

v. DOCKET NO. 96-02-329

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Beverley Rogers, Grievant, is employed by the Berkeley County Board of Education (Respondent). She alleges:

> Grievant was reduced-in-force from her position as a Transportation Supervisor: (a) unjustly and without cause in violation of West Virginia Code §18-2-6[,] and (b) against the best interest of the school system. Grievant request reinstatement to employment as a Transportation Supervisor, retroactive wages, benefits, and seniority. (See footnote 1)

Grievant was denied relief at the lower levels of the grievance procedure. This matter was appealed to Level IV on August 1, 1996. A Level IV evidentiary hearing was held on November 8, 1996. The case matured for decision on December 10, 1996, upon receipt of post-hearing submissions by Grievant.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant is currently employed by Respondent as a Custodian. Prior to her reduction in force (RIF), Grievant was the Transportation Supervisor, a service personnel position. However, she was often referred to as part of the Administration. She has a high school diploma.

2. Grievant's RIF letter dated March 4, 1996, from Superintendent James E. Bennett, provided in

pertinent part:

> As a result of the ever changing needs of the Berkeley County School System due to the rapid population increases being experienced in the county, the position of Supervisor of Transportation is being eliminated for the 1996-97 school year for lack of need. Accordingly, you are hereby advised that I intend to ask the Berkeley County Board of Education to terminate your contract as Supervisor of Transportation effective with the end of the 1995-96 school year. This action would place you on the preferred recall list pursuant to W[.]V[.] Code [§] 18A-4-7a (See footnote 2) allowing you to be notified of position openings for which you qualify.

Board Hearing (BH), Adm. Ex. 1. Emphasis added.

3. Grievant has been employed continuously by Respondent since August 1971. The first seventeen years, she was a bus operator. Three of those years, Grievant was a special education bus operator. Grievant was the Transportation Supervisor for eight years.

4. Grievant had good evaluations while working as the Transportation Supervisor. She received the following ratings on her evaluations for the last six years: ---------E X P E C T A T I O N S--------

Year	Exceeds	Meets	Does Not Meet
1996	2	13	0
1995	8	7	0
1994	7	8	0
1993	8	7	0
1992	5	10	0
1991	6	9	0

5. The “Evaluator's Comments” on her evaluations do not contain any negative comments. In 1996, in the Evaluator's Comments section, Director Carte wrote: “Bev has the very difficult assignment of scheduling special needs transportation. She has performed these stressful duties in a way which is superior to any of her predecessors.” Level IV, Gr. Ex. 3.

6. Under Evaluator's Comments in 1991, Director C. Robert Fulk (See footnote 3) wrote:

> Mrs. Rogers is an asset to our Department. She exceeds my expectations to complete an assignment in a most expedious [sic] manner. She is very knowledgeable with our bus runs and stops. She has become very proficient using our computer to cut P.O.'s. Mrs. Rogers does an outstanding job for me and the Dept. Thank you for your support. It is a pleasure to work with you.

Level IV, Gr. Ex. 3.

7. Grievant knows how to read and use a map.

8. Grievant was not lacking in “interpersonal skills,” and performs well in most situations. BH, Tr. 51-52.

9. Part of Grievant's duties was to evaluate all (nineteen) of the special education drivers, and all (nineteen) special education aides. Grievant performed these duties well. (See footnote 4) 10. Grievant would have been willing to work over forty (40) hours a week. However, because she was not paid over-time Grievant had to use compensatory time. Grievant was not allowed to accumulate over three hours of compensatory time.

11. When Grievant was in the Transportation Department there were three “administrators” - Director Larry Carte, Assistant Director Bill Riggleman, and Grievant.

12. On May 13, 1996, Respondent posted an “Administrative Vacancy” for a second “Assistant Director of Transportation,” which listed the following duties and responsibilities:

a. Determination and scheduling of appropriate transportation services for special needs students.

b. Supervision of special needs transportation services and personnel.

c. Maintenance of a computer program (EDVLOG) to locate students and bus stops on a computerized map.

d. Assist the Director of Transportation in determining school bus routing and responding to questions/ problems with bus runs.

e. Establish a computerized inventory system for bus parts.

f. Scheduling kindergarten transportation.

g. Assisting in the evaluation of employees.

h. Assisting the Director of Transportation in resolving problems with parents, principals, teachers, bus drivers, aides, and the general public.

i. Documenting activities of the Transportation Department employee.

j. Assisting in the screening and hiring of personnel for the Transportation Department.

k. Assisting in developing and implementing an ongoing training and staff development program for departmentemployees.

l. Assisting the Director of Transportation in the assessment of road conditions during periods of inclement weather.

m. Performing additional related responsibilities as assigned by the Director of Transportation.

Level IV, Gr. Ex. 2.

13. Grievant, before her RIF, was performing all of the above duties, except for c, e, j, k, and l. Duties c and e were new anticipated duties which no one performed prior to Grievant being RIF'd, nor was Grievant ever asked to perform these duties. Grievant performed duty j when Director Fulk was head of the Department of Transportation, but this task was removed from her duties after Mr. Carte became Director. Before Grievant's RIF, duty k had been performed by the central office. Grievant was never asked by Director Carte to perform duty l.

14. Six days after Grievant's RIF and elimination of the Transportation Supervisor position, a new Assistant Director of Transportation, Mr. Terry Forrest, began working for Respondent. Mr. Forrest was awarded the second Assistant Director of Transportation position. He does not have a degree in computer science or computer applications. He has a bachelors degree in math, and a masters degree in education. When Mr. Forrest began working he was assigned all of Grievant's duties.

15. It was necessary for Mr. Forrest to obtain training on the EDVLOG program.

16. Assistant Director Riggleman has a bachelors degree in industrial arts. 17. Director Carte has a bachelors degree in biological and general science.

18. Neither Assistant Director Riggleman or Director Carte has any experience as a bus operator, nor do they have significant experience in working with computers.

19. Respondent determined to eliminate Grievant's position and replace it with a professional position. In addition to the perceived need for a “computer fluent” employee, Respondent also wanted an employee who was not entitled to compensatory time or overtime for working over forty hours in a work week.

20. Respondent determined that the transportation needs of the county, presently and in the future, required design and utilization of a system that required computer mapping, coordination, routes design and utilization of the computer system, utilizing computer reading software (EDVLOG).

21. The EDVLOG program cost $100,000, and is shared among eight counties. Mr. Gus Mungen, a technology specialist, was hired (See footnote 5) to implement the system. BH, Tr. 43.

22. A major part of the training on the EDVLOG program was to be performed by an individual from the University System of North Carolina. BH, Tr. 43.

23. Grievant was never offered or provided with any computer training which would aid her in learning the EDVLOG program. 24. Mr. Forrest did not attend EDVLOG training until (approximately) the first part of December, 1996, ten months after Grievant received her RIF letter.

25. Grievant was RIF'd in March, 1996, for a future projected need, and not because of any deficiency in her work performance. (See footnote 6) 26. The number of students Respondent's Transportation Department transports has grown in the last eight years from 8,000 students to 11,000 students. In the Transportation Department, Respondent employs 101 regular bus operators, 23 substitute bus operators, 8 mechanics, 19 aides, 2 secretaries, and 3 "administrators.” Growth is expected to continue for several years in the future.

DISCUSSION

The reduction-in-force procedure of W. Va. Code §18A-4-8b provides, in pertinent part:

> If a county board of education is required to reduce the number of employees within a particular job classifi- cation, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within such classification or grades of classification, he or she shall be employed in any other job classifi- cation which he or

> she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

Grievant was RIF'd when the transportation department was growing. Respondent established that its department has grown approximately 30% in eight years. Given the facts in this case, toallow the above Code Section to reduce-in-force an employee when a department is expanding is a misapplication of W. Va. Code §18A-4- 8b. See Williams v. Raleigh County Bd. of Educ., Docket No. 95-20- 169 (Aug. 31, 1995)(grievant was RIF'd because the number of plumber positions was being reduced), Bennett v. Upshur County Bd. of Educ., Docket No. 96-49-189 (Sept. 20, 1996)(grievant was RIF'd because the school to which she was assigned closed), Bell v. Kanawha County Bd. of Educ., Docket No. 96-41-169 (Dec. 31, 1996)(grievant was RIF'd to make room for a more senior employee).

Although reduction in force (RIF) is not defined by statute or case law, RIF cannot be interpreted as “replace.” Respondent merely replaced Grievant by deeming it a professional position, and assigning her duties to a newly-hired employee. Respondent was not attempting to reduce its staff. Before Grievant was RIF'd, Respondent had three Transportation “Administrators.” Six days after Grievant left, Respondent again had three administrators. Therefore, Grievant was improperly RIF'd. School personnel laws and regulations are to be strictly construed in favor of the employees they are designed to protect. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979).

Respondent also asserted that Grievant was RIF'd because of “lack of need.” (See footnote 7) However, the need for someone performing the same duties is obvious given that Respondent assigned all of Grievant's duties, along with EDVLOG, to its newly hired Assistant Director. In a case like this, an employee cannot be RIF'd, under the guise of “lack of need” where the duties are simply transferred to a new employee, or if the duties must be performed. See Graham v. Wyoming County Bd. of Educ., Docket No. 55-88-141 (Oct. 12, 1988).

In Graham, the Wyoming County Board of Education RIF'd the Assistant Director of Transportation to save the salary of the position. However, the Director of Transportation was unable to carry out all of the responsibilities of his position and those of the Assistant Transportation Director as well. Therefore, the Grievance Board granted the grievance, and ordered the grievant be reinstated to the Assistant Director of Transportation position.

The Grievance Board's decision in Graham was appealed to the Circuit Court of Wyoming County. The Court, in the last paragraph of its decision, upholding the Grievance Board's decision,

stated "[i]f it had been explained how the Transportation Department could properly be operated without employee and lack of need in rebuttal to the evidence showing the required functions were not carried out in the elimination of the position, the Court's decision would be otherwise." Graham v. Wyoming County Bd. of Educ., Civil Action No. 88-C-557 (June 28, 1989). (See footnote 8)

Moreover, the record indicates that Respondent did not want to pay Grievant overtime. Grievant was not paid overtime, and was required to take compensatory time. She was allowed to accumulateonly three hours before Respondent required her to take compensatory time off. W. Va. Code §18A-4-8a, which provides, in pertinent part:

> (6) Any full-time service personnel required to work in excess of their normal working day during any week which contains a school holiday for which they are paid shall be paid for such additional hours or fraction thereof at a rate of one and one-half times their usual hourly rate and paid entirely from county board of education funds.
>
> (7) No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

In this case, Respondent tried to circumvent the Code's protections by RIF'ing Grievant, and hiring a "salaried" person in her place. Wage restrictions are protections created by the legislature for service personnel employed by county boards of education, and should not be used as a sword to sever good, dependable, hard-working employees from their positions.

Respondent asserted that Grievant was not able to evaluate properly bus operators and aides because she was also service personnel. However, her evaluations fail to contain a single negative comment concerning the evaluations Grievant has performed over the years on other service personnel.

Respondent tried to bolster its position by producing irrelevant evidence on several events which occurred after Grievant received her RIF letter to try discount her skills and abilities. For example, Respondent raised the fact that Grievant "walked out" on a secretarial typing test she took after she was displaced. Again, Grievant's evaluations fail to cite any deficiencies with her typing or keyboarding abilities, and this evidence is irrelevant because it occurred after she was RIF'd and is unrelated to the alleged reason of the RIF. These arguments also seem strange since Respondent's position was that Grievant was a good employee, RIF'd because of "lack of need."

The record also fails to contain any evidence that: (1) Grievant was unwilling to work overtime, if compensated, (2) Grievant's duties were eliminated by computer programs, including EDVLOG, and (3) Grievant could not be trained or lacked the ability to learn the programs necessary for her to retain her position within the Transportation Department.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Webster County Bd. of Educ. v. Johns, 191 W.Va. 664, 447 S.E.2d 599 (1994); Dillon v. Bd. of Educ. of County of Wyoming, 177 W.Va. 145, 351 S.E.2d 58(1986).

3. "The clear legislative intent of W. Va. Code §18A-4-8b is to preserve, when possible, the on-going employment status of long- time board of education employees." Roberts v. Marshall County Bd. of Educ., Docket No. 91-25-395 (Jan. 15, 1992).

4. School personnel laws and regulations must be strictly construed in favor of the employees they are designed to protect. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979).

5. Grievant proved by a preponderance of the evidence that she was entitled to be reinstated to her previous position of Transportation Supervisor.

6. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party (Grievant) in the same position she would have been, had she not been deprived of the sum owed her and had benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, the grievance is **GRANTED**. It is **ORDERED** that Respondent reinstate Grievant to the position of Transportation Supervisor, and to pay her back pay in the amount of the difference

between the compensation she would have received had she not been improperly RIF'd, plus interest. It is also **ORDERED** that Grievantbe awarded all other benefits she would have received during this time frame.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Berkeley 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 are 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.

DATED: 4/30/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant did not challenge the notice provisions of W. Va. Code §18A-2-6, entitled "Continuing contract status for service personnel; termination."

Footnote: 2

W.Va. Code §18A-4-7a is inapplicable in this case because it deals with professional personnel. Grievant is a service employee.

Footnote: 3

Mr. Fulk was the Transportation Director before Mr. Carte.

Footnote: 4

There is no evidence on any of Grievant's evaluations that she is lacking in this area.

Footnote: 5

The record is unclear as to whether Mr. Mungen was hired by all eight counties, or what the exact nature and arrangements of his employment are. However, the record is clear that Mr. Mungen is not a member of Respondent's Department of Transportation, and is not under the direct supervision of Director Carte.

Footnote: 6

RIFs are not based on poor work performance.

Footnote: 7

Grievant's RIF letter dated March 4, 1996, which was Adm. Ex. 1, at the Board's Hearing.

Footnote: 8

While Administrative Law Judges of this Grievance Board are not bound to follow Circuit Court decisions as precedent, in this case, the rationale found in the Graham decision of the Circuit Court of Wyoming County is persuasive.