CONNIE DAUGHTERY and LAURA

HARSHBARGER,

Grievants,

v. **Docket No. 96-22-528**

LINCOLN COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Connie Daughtery and Laura Harshbarger (See footnote 1), allege the Lincoln County Board of Education ("LCBOE") violated W. Va. Code §18A-4-7a in regard to their reduction in force ("RIF"), and allege they were placed on the preferred recall list while less senior teachers in their certification area remained in their positions. As relief, Grievants request reinstatement to their former positions. This grievance was waived at Levels I and III and denied at Level II.

Grievants then appealed to Level IV, and the parties decided to submit the case on the record, with the agreement that the hearings from the RIF proceedings be made a part of the record. The records from the RIF hearings were requested several times without success. Eventually, the parties agreed to submit the case without the records of the RIF proceedings, and this case became mature for decision on August 1, 1997.

After a careful review of the entire record, the Undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. During the 1995-1996 school year, LCBOE decided to close Midkiff Elementary ("ME") which created a need to transfer and RIF multiple employees. (See footnote 2)

2. Grievant Harshbarger had been employed as a classroom teacher by LCBOE for six years. She was notified during the Spring of 1996 of her RIF for the 1996-1997 school year to provide a position for a more senior teacher. The potential plan was for Ms. Sharon Adkins, a more senior

teacher from ME, who was then on leave, to assume Grievant Harshbarger's position.

3. Grievant Daughtery had been employed as a classroom teacher by LCBOE for five years. She was notified during the Spring of 1996 of her RIF for the 1996-1997 school year to provide a position for a more senior teacher. The potential plan was for Ms. Lydia Spurlock, a more senior teacher from ME, to assume Grievant Daughtery's position.

4. At the same time Grievants were RIF'd, two other teachers, Sue Sammons and Courtney Cooper, were also RIF'd to be replaced by more senior teachers. They both had less seniority than Grievant Harshbarger, and Ms. Sammons had less seniority thanGrievant Daughtery. (See footnote 3)

5. Grievants, Ms. Sammons, and Ms. Cooper were all to be placed on the PRL as the result of these RIF's.

6. The certifications of Grievants, Ms. Sammons, and Ms. Courtney were similar, and Grievants were certified to teach in Ms. Sammons's and Ms. Courtney's positions. (See footnote 4)

7. Prior to or on June 30, 1996, the specific reasons for Ms. Sammons' and Ms. Cooper's RIF's lost their stated justification, as the teachers who were to be placed in their positions either selected other positions or elected to retire. However, the overall need to RIF a certain number of teachers in their certification area remained. LCBOE, following previous Grievance Board decisions, reinstated Ms. Sammons and Ms. Cooper to their former positions without posting.

8. This turn of events resulted in two less senior teachers being retained in their positions during a RIF process, while two more senior and similarly certified teachers were placed on the PRL.

9. Before the beginning of the 1996-1997 school year, Grievant Harshbarger was recalled. Shortly thereafter, GrievantDaughtery was recalled to a half-time position.

Discussion

W. Va. Code § 18A-4-7a controls the actions that should be taken by a county board of education during the RIF process. That Code Section states in pertinent part:

> 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 . . .: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification

> and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of these areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/ or licensure.
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> . . .
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> All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area for which they had previously been employed or to any lateral area where they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

The pertinent provisions of W. Va. Code §18A-2-2 state:

> [A] continuing contract shall not operate to prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of lawrelating to the allocation to teachers and students ratios. But in case of such dismissals, the teachers so dismissed shall be placed upon a preferred list in the order of their length of service with that board, and no teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, shall have been offered the opportunity for reemployment in a position for which they are qualified . . . .

This Grievance Board has never been presented with the exact same set of facts as seen in this grievance. The prior grievances relied upon by LCBOE presented only the issue of whether a specific grievant should be reinstated into his or her position, if the transfer or RIF lost its stated justification before the end of the school year, June 30th. The issue of whether another, more senior individual was impacted, or whether the decision to reinstate a grievant would result in a less senior employee being retained while a more senior employee was placed on the preferred recall list, has not been argued or addressed.

In Barberio v. Harrison County Board of Education, Docket No. 89-17-351 (Feb. 13, 1990), the Administrative Law Judge ("ALJ") held that "[i]t was a violation of W. Va. Code §18A-2-7 to transfer an employee when no valid basis for that action existed at the time of the transfer hearing." In dicta, the ALJ also found that a transfer was not effective until the end of the school year, even though such action had been taken and affirmed by the board and proper notice given to the grievant. Thus, the

time frame for filing a transfer or RIF grievance was extended past the statutorily mandated timelines.

In Brown v. Logan County Board of Education, Docket No. 90-23- 177 (Oct. 31, 1990) the ALJ allowed the grievant to extend the timeshe could file a grievance over her transfer and held:

> When a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, absent some extraordinary circumstance[,] the employee is entitled to instatement into the position he would have held but-for the transfer. A county board of education's failure to offer such is, absent the referenced "extraordinary circumstance," an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed as abuse of discretion.

Brown, supra at COL 1.

Later this same conclusion of law was applied to RIF cases in Conner v. Kanawha County Board of Education, Docket No. 92-20-204A (Sept. 23, 1992) and Clay v. Mingo County Board of Education, Docket No. 94-29-516 (Dec. 22, 1994) with little discussion of the differences in an employees' status during a transfer as compared to a RIF. The timelines for filing a RIF grievance, in this situation, were also extended to the end of the school year. This is the line of cases LCBOE applied in reversing the RIF's of Ms. Cooper and Ms. Sammons. Because the specific persons who were to replace these teachers were no longer going to be placed in their positions, LCBOE interpreted this situation to mean the reason for their individual RIF's lost its justification prior to the end of the school year; thus, LCBOE returned these teachers to their former positions. However, the basic or general reason for these teachers' RIF, for more senior teachers to have a position when there was a need to decrease the number of teachers in the certification area, did not change.

This Grievance Board adheres to the doctrine of stare decisis in adjudicating the grievances that come before it. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-345 (Apr. 27, 1995). See Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Chafin v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-132 (July 24, 1992)(citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 160 (1974)). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purpose of the statutes applied. Consistent with this approach, this Grievance Board

follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decisions are clearly in error.

It is obvious from the facts in this case that the result reached in this grievance is contrary to W. Va. Code § 18A-4-7a. It is also obvious LCBOE reached this decision by relying upon decisions of this Grievance Board such as Barberio, supra, and Brown, supra. As these cases dealt with individually filed grievances, they did not examine the issue presented here. The obvious result is that this Grievance Board must reexamine its prior rulings in light of these facts to assure the above-stated Code Sections are followed, and that our case law does not deviatefrom the statutory law.

The key Code Section to be addressed is W. Va. Code § 18A-4-7a which states in pertinent part:

> 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 . . .:

The statute mandates that the least senior teacher or teachers, in the area of certification to be reduced, will be RIF'd and placed on the PRL. (See footnote 5) This Grievance Board has stated in prior cases that if the reason for the RIF loses its justification, the employee should be reinstated or should continue in his or her current position. Clearly this statement must be clarified and changed and broadened to include an examination of all RIF'd employees in the certification area, and not each individual's specific employment situation.

Accordingly, there are two areas that must be clarified. One, an individual may be reinstated prior to the board of education's final action of voting on and confirming the employee's RIF. That is, if it is known before final action of a board, on the first day in April, that employees in certain certifications need not be RIF'd, the most senior of these employees should be removed from the RIF list, and either reinstated into the former positions they originally held or placed on the transfer list. (See footnote 6) However, if,after the board votes and confirmation occurs, a board discovers there is a need for an employee to fill a position, the position must be posted, and teachers on the PRL can apply and be recalled in accordance with Paragraph Nine of W.Va. Code §18A-4-7a. This action would result in the most senior teachers being employed in their area of certification, and the least senior teachers being the ones who are RIF'd.

In the instant case, LCBOE did not look at the overall picture of transfers and RIF's, but instead looked at each case only as to the specifics. This was incorrect. The appropriateness of a specific

reinstatement must be examined in light of all the personnel affected in the county within the certification area. The key issue to examine would be the seniority of the RIF'd teachers. Thus, for example, instead of noting that the specific teacher who was to replace Ms. Cooper no longer needs to be placed in Ms. Cooper's position, LCBOE should note that one less teacher in that certification area needs to be reduced. Depending on when this knowledge was obtained, the most senior teacher may be reinstated to her original position, placed in the vacant position, or the position may need to be posted, which would most likely result in the most senior teacher receiving the position.

Thus, a RIF'd employee is only entitled to reinstatement to his/her former position if a board knows before taking the finalRIF action that the RIF of this employee was no longer needed. If, after the final RIF action, the RIF is no longer required as the need to decrease the number of teachers in the certification area has changed, the position is to be filled following the proper statutory provisions. To the extent that this decision is in disagreement with this Grievance Board's prior decisions dealing with reinstatement after RIF's, such as Conner, supra, and Clay, supra, those decisions are specifically overruled.

Further, it is essential to clarify, as indicated in the above-discussion, that the timelines for filing a RIF grievance must comply with those statutorily mandated in W. Va. Code § 18-29- 4(a). The time for filing a grievance begins to run on the date when "the employer unequivocally notifies the employee of the termination decision." Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (W. Va. 1989)(citing Independent Fire Co. No. 1 v. W. Va. Human Rights Comm'n, 376 S.E.2d 612 (W. Va. 1988)). See Rose v. Raleigh County Bd. of Educ., Slip Op. No. 23450 (W. Va. Feb. 24, 1997). This Board's prior ruling that a RIF grievance may be filed within fifteen days after the end of the school year is incorrect and is specifically overruled as it conflicts with the mandates of the grievance statute and the above-cited rulings of the West Virginia Supreme Court. This ruling is prospective and would not affect the grievances currently filed over RIF's that occurred in the Spring of 1997.

Of course, this analysis does not mandate that Grievants receive their requested relief, to be reinstated to their priorpositions, but it does result in continuing employment of the most senior employees in an identified certification area. As Grievant Harshbarger may not wish to be placed in the position of either Ms. Sammons or Ms. Cooper, she may choose to continue in the position she currently holds. If she wishes to be placed in one of these two positions, she, being the more senior of the two Grievants, may, given the specific facts of this case, choose which position she wants.

As for Grievant Daughtery, it is clear she should have held a full-time position from the beginning of the 1996-1997 school year. If she has obtained a full-time position at this time that she prefers to keep, she may do so. If she has not, LCBOE is directed to place her in the position of the least senior teacher in her area of certification. Additionally, she is to receive full seniority for the time she worked half-time and to be reimbursed as a full-time employee. (See footnote 7)

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. "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 . . .". W. Va. Code § 18A-4-7a. 2. The appropriateness of a specific reinstatement after a RIF must be examined in light of all the personnel affected in the county within the certification area. The key issue to examine would be the seniority of the RIF'd teachers.

3. The date by which to file a grievance in a RIF action is controlled by W. Va. Code 18-29-4(a) which states:

> within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .

4. The time for filing a RIF grievance begins to run on the date when "the employer unequivocally notifies the employee of the termination decision." Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843 (W. Va. 1989)(citing Independent Fire Co. No. 1 v. W. Va. Human Rights Comm'n, 376 S.E.2d 612 (W. Va. 1988)). See Rose v. Raleigh County Bd. of Educ., Slip Op. No. 23450 (W. Va. Feb. 24, 1997).

5. To the extent that this decision is in disagreement with this Grievance Board's prior decisions dealing with reinstatement after RIF's, those decisions are specifically overruled.

6. Grievants have met their burden of proof and demonstrated their RIF was improperly conducted as they were RIF'd and placed on the preferred recall list while teachers with less seniority in their certification area were retained. A board is required to look at the seniority of all employees in the certification area when deciding which employees need not be RIF'd as opposed to the specific facts of an individual situation. Accordingly, this grievance is **GRANTED**. LCBOE is directed to

place Grievant Harshbarger in either the position of Ms. Sammons or Ms. Cooper, if she wishes to be placed in these positions instead of the one she currently holds. LCBOE is directed to place Grievant Daughtery into the full-time position of the least senior teacher in her area of certification, and to pay her all the salary and benefits she would have received if she had been a full-time employee, less the salary and benefits she received as a part-time employee. Additionally, given the time that has passed, if the parties wish to resolve this grievance in a different way than outlined above, and can come to a mutual agreement of these issues they may do so. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 31, 1997

Footnote: 1

Prior to the grievance reaching Level IV, Grievant Susan Baisden received employment outside the county and withdrew her grievance.

Footnote: 2

The Faculty Senate of ME voted that any position created by the closure of ME would be filled by a teacher transferred from that school. It is unclear that this occurrence and vote had any effect on Grievants' RIF as they had less seniority than the teachers who replaced them. Thus, they could not have remained employed while these teachers were placed on a preferred recall list ("PRL").

Footnote: 3

The record is unclear as to whether Grievant Daughtery had more seniority than Ms. Cooper.

Footnote: 4

Although this fact was not clearly stated in the record, LCBOE noted it would have recalled Grievants before retaining Ms. Sammons or Ms. Cooper if it had not been for this Grievance Board's prior cases. Additionally, LCBOE did not disagree

with the testimony below that the two employees retained were less senior than two other more senior employees who were placed on preferred recall.

Footnote: 5

This discussion of RIF's should not be construed to apply to transfers, as this is a separate issue and is not addressed by this Grievance Board at this time.

Footnote: 6

This method of allowing for a RIF to be changed to a transfer may require some change in the RIF notice sent to employees so theymay be informed that if the reason for the potential RIF is no longer present at the time of final board action they may still be subject to a transfer depending on the needs of the school system.

Footnote: 7

Given the amount of time that has passed since this grievance was initiated, and the number of RIF's occurring in many counties, the basis for this relief in terms of placement into a position is contingent upon Grievants being more senior than another currently employed teacher in their area of certification.