LEO G. LAKE

v. Docket No. 96-06-256

CABELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Leo G. Lake, employed by the Cabell County Board of Education (Board) as a professional employee, filed a level one complaint on or about March 14, 1996, in which he alleged that he had been denied approximately 240 days of administrative seniority. Grievant's immediate supervisor lacked authority to rule on the matter. Subsequent to a level two hearing, Superintendent Richard Jefferson denied the claim. The Board waived consideration at level three, and the matter was advanced to level four on June 21, 1996. The parties agreed to submit the grievance for decision based upon the record, supplemented with statements filed on or before September 18, 1996. (See footnote 1)

The essential facts of this matter are undisputed and will be set forth as findings of fact.

1. Grievant was employed by the Board as a teacher when he was assigned as Interim Assistant Principal at Barboursville Middle School, effective October 11, 1993.

2. Grievant held the Interim position until June 20, 1994, a total of 173 days.

3. Grievant returned to a teaching position for the 1994-95 school term.

4. Grievant once again filled an Assistant Principal position on an Interim basis from January 17, 1995, through March 14, 1995, a total of 41 days. (See footnote 2)

5. Grievant was not approved by the Board to hold the position of Interim Assistant Principal and was not provided an administrative contract for this work on either occasion. 6. Grievant was paid the county administrative stipend for the time served as Interim Assistant Principal.

7. Grievant was employed by the Board as Assistant Principal at Barboursville Middle School effective the 1995-96 school term.

8. By memorandum dated February 26, 1996, all administrators were advised of their administrative seniority.

9. Five employees, including Grievant, were credited with administrative seniority beginning the 1995-96 school term.

10. Due to a reduction in force, a number of Middle School Assistant Principals, including Grievant, were subject to a reduction in force for the 1996-97 school year.

11. Had Grievant been credited with seniority for his administrative work in 1993- 94 and 1995, his administrative contract would not have been terminated. Grievant first asserts that the Board defaulted by not responding to the level three appeal in a timely manner. He asserts that he hand delivered the level three form, which was dated May 23, 1996, to the superintendent's office on May 24, 1996. A level three response, in which the Board waived consideration of this matter, is dated June 4, 1996.

W.Va. Code §18-29-4(c) provides in pertinent part that "[w]ithin five days of receiving the appeal, [the] governing board may conduct a hearing . . . render a decision based on [the] record, or may waive the right granted herein and shall notify the grievant of such waiver." The level three decision was not issued within five working days of receipt of the appeal.

W.Va. Code §18-29-3(a) provides that if a grievance evaluator required to respond to a grievance at any level fails to make the required response in the statutory time limits, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. The Board made no request for such a hearing at level four.

This Board has previously held that it is not empowered to enforce a default which may have occurred at the lower grievance levels; rather, it is permitted only to hear the claim of the employer. Smith v. Bd. of Directors/West Liberty State College, Docket No. 93- BOD-051 (Feb. 17, 1993) and Hoff v. Bd. of Trustees/West Va. Univ., Docket No. 93-BOT- 104 (June 30, 1994). Because the employer did not request a hearing at level four, noaction may be taken at this level. Should Grievant choose to pursue this issue, enforcement must be sought at the appropriate Circuit Court.

Regarding the issue of seniority, Grievant concedes that he was not aware of any Board action appointing him to the Interim positions, and that he did not receive an administrative

contract for either assignment. Nevertheless, he argues that he is entitled to administrative seniority because he is an employee as defined by W.Va. Code §18-29-2(c), and a beneficiary of the W.Va. Code §18A-4-7b provision that "a professional employee shall begin to accrue seniority upon commencement of the employee's duties." (See footnote 3) Grievant stated that the first assignment had been posted and he had submitted an application, but that he was offered, and accepted, the position as a temporary assignment to avert a flurry of transfers, by as many as seven Assistant Principals during the school year. (See footnote 4) Although Grievant opined that had the position been formally assigned, he would have likely obtained another administrative post as a result of the vacancy, he stated that he accepted the temporary assignment to assist the administrators in avoiding the multiple transfers. He notes that in addition to receiving administrative salary, he was evaluated as an assistant principal, not as a teacher, for the 1993-94 year, and he received a letter at the end of the year advising that he would be transferred to a teaching position the subsequent year. The Board first contends that the grievance was not timely filed. The Board suggests no specific date that the action should have been initiated, but only asserts that Grievant should have "long ago" pursued the issue. Addressing the merits of the grievance, the Board suggests that, if anything, Grievant was serving as a substitute assistant principal during the periods of time in question, and did not earn regular seniority. It is the Board's position that Grievant was not employed as Interim Assistant Principal under the provisions of W.Va. Code §18A-4-7a, which provides that all vacancies in existing or newly created positions must be posted and filled under specified criteria. The Board also cites W.Va. Code §18A-2-1, which specifies that employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent, and W.Va. Code §18-2-9, which mandates that persons employed as principals receive written administrative contracts.

Based upon the foregoing, the Board also asserts that Grievant's principal could not lawfully enter into an assistant principal's contract, in that the authority to hire professional employees lies only with the Board. Because the Board took no action to hire Grievant, it argues that the action of the principal was ultra vires, and not binding upon it. Finally, the Board notes that should Grievant be granted regular administrative seniority, a precedent will be set under which any teacher who performs duties like those of an assistant principal might

later claim incremental administrative seniority, gaining an advantage over contracted assistant principals. (See footnote 5) It must first be concluded that the grievance was timely filed. W.Va. Code §18-29- 4(a) provides in pertinent part:

(1)[b]efore a grievance is filed and 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, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor. . . shall be conducted within ten days of the request therefor. . . .

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

It is the Board's contention that the grievable event occurred when Grievant assumed the interim assignments without an administrative contract, making a complaint filed approximately three years later, untimely. Although Grievant conceded that he knew that he had not been provided with an administrative contract, and that the Board had not taken any action to employ him in an administrative position at the time, it was reasonable for Grievant to believe that he was being credited with administrative service given that his salary and performance evaluation reflected that status.

Grievant testified he learned that he had not earned administrative seniority for the time periods in question only when he received the memorandum of February 26, 1996. The record does not establish that the seniority list was published prior to that time, or that Grievant would have had reason to be aware of his status prior to receiving the memorandum. Given these facts, the discovery rule exception contained in Code §18-29-4(a)(1) applies. Therefore, the time for Grievant to initiate his complaint did not begin to run until he knew of the facts giving rise to the grievance. See Spahr v. Preston County Bd. of Educ., 182 W.Va. 726, 391 S.E.2d 739 (1990). In this case the date of discovery would be February 26, 1996. The level one

grievance was dated March 14, 1996, within the ten day period.

Having determined the matter timely filed, the substantive issue may be addressed. Respondent is entirely correct that personnel may only be hired by official Board action and that a school principal does not possess the authority to hire an employee on the Board's behalf. This is not dispositive in the present matter, however. Although Grievant may have been approached by BMS principal Orman Hall and offered the position on an interim basis, this course of action could not have been determined by Mr. Hall alone. Other, higher level administrators were surely aware of the vacancy, although the record does not establish whether the Board members were advised of the action. The school principal would have lacked the authority to temporarily fill the position. Perhaps most persuasive is the fact that Grievant was paid the administrative supplement for the time he was acting assistant principal. It is unlikely that the school principal processed the payroll, and even if he did so to some degree, authorization for the increased expense would have required approval from another office. Together, these factors lead to the conclusion that Grievant was assigned as an assistant principal, albeit without formal Board approval.

The Board's argument that Grievant's reassignment was an ultra vires promise made by the principal, similar to the factual situations in Malone v. Marion County Bd. of Educ. Docket No.96-24-084 (May 30, 1996) and Lee v. Hampshire County Bd. of Educ., DocketNo. 95-14-424 (Jan. 22, 1996), is not persuasive. The administrators who reassigned Grievant as an Interim Assistant Principal were employed by the Board, making the Board responsible for their actions under the doctrine of respondeat superior. See, e.g., Cremeans v. Maynard, 162 W.Va. 74, 246 S.E.2d 253 (1978). The Board's failure to properly oversee the actions of its administrators makes the school board responsible for conduct that is patently arbitrary and capricious in these circumstances. See Cowen v. Harrison County Bd. of Educ., 195 W.Va. 377, 465 S.E.2d 648 (1995). It is well established that a county board of education possesses substantial discretion in personnel matters, but that discretion must be exercised reasonably and not arbitrarily or capriciously. State ex rel Hawkins v. Tyler County Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980); and Beverlin v, Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554 (1975).

Further, Grievant is protected by the school personnel laws and the grievance procedure

from unfair treatment, and these laws are to be construed strictly in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979). For example, the failure to place an employee in the same classification as other employees who perform the same duties may result in discrimination as defined by W.Va. Code §18-29-2(m). See Friend v. Preston County Bd. of Educ., Docket No.39-87-001-2 (Mar. 12, 1987). Finally, the Board's suggestion that Grievant was acting as a "substitute" assistant principal cannot be accepted because there is no statutory or other authority which allows a full-time professional employee to work as a substitute in another position.

Even if the Board should be determined an innocent party, Grievant would prevail under the holding of Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr.30, 1987). In this decision the Grievance Board recognized that "where one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." Therefore, Grievant is entitled to administrative seniority for the period of time in dispute.

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

Conclusions of Law

1. In a nondisciplinary grievance the grievant must prove each element of the complaint by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §4.19 (1996); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130(Aug. 19, 1988).

2. While county boards of education possess substantial discretion in personnel matters, that discretion must be exercised reasonably and not arbitrarily or capriciously. Dillon v. Bd. of Educ. of the County of Wyoming, 151 S.E.2d 59 (W.Va. 1986).

3. "[W]here one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987).

4. The Board acted arbitrarily and capriciously when it denied Grievant seniority for

administrative work which he completed at the request of higher level administrators.

5. Grievant was entitled to an administrative contract for the two periods of time he served as Interim Assistant Principal. Accordingly, the grievance is Granted and the Board Ordered to credit Grievant with 214 days of administrative seniority.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.

Date: May 13, 1997

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***This matter was transferred to the undersigned Administrative Law Judge for administrative reasons on January 22, 1997.***

Footnote: 2 ***Grievant amended his complaint at level three to accept the Board's calculation of 214 days of administrative seniority.***

Footnote: 3 ***W.Va. Code §18-29-2(c) defines employee as "any person hired as a temporary, probationary or permanent employee by an institution either full or part time. . . ."***

Footnote: 4 ***Although Grievant testified at level two that the position had been posted and he had applied, in the level two decision Superintendent Jefferson included as a finding of fact that the position had not been posted. No additional evidence was submitted by either party to resolve this discrepancy.***

Footnote: 5 ***It appears to be the Board's position that Grievant may consider this time as experience for purposes of applying for other administrative positions. See Level II Transcript, p. 25.***