RAYMOND E. HOPKINS,

Grievant,

v. DOCKET NO. 96-41-432

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Raymond E. Hopkins (Grievant) submitted this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Raleigh County Board of Education (RCBE) violated W. Va. Code § 18A-4-8g in regard to his reduction-in-force (RIF). Grievant initiated this grievance at Level I on April 19, 1996. As his immediate supervisor could not provide the relief requested, Grievant appealed to Level II where an evidentiary hearing commenced on May 9, 1996. That hearing was continued and not completed until September 9, 1996. Thereafter, Dr. Charlotte Hutchens, the Superintendent's Designee, issued a decision denying the grievance on September 16, 1996. Grievant appealed that decision to Level III where RCBE waived consideration of the grievance in accordance with W. Va. Code § 18-29-4(c).

Grievant appealed to Level IV on October 2, 1996, and, following a lengthy continuance, a Level IV hearing was conducted by Administrative Law Judge Jerry Wright in Oak Hill, West Virginia, on August 26, 1997. The parties were provided an opportunityto submit written post-hearing arguments, and this matter became mature for decision upon receipt of the parties' submissions on September 29, 1997. Thereafter, following the resignation of Judge Wright, this matter was administratively reassigned to the undersigned for decision on December 24, 1997.

The facts which are dispositive of this grievance are set forth in the following Findings of Fact derived from the extensive record developed through Level IV. **(See footnote 1)**

FINDINGS OF FACT

1. Grievant was employed by the Raleigh County Board of Education (RCBE) in its Maintenance Department as a Foreman/Sanitation Plant Operator, a multi-classified school service personnel position.

2. Grievant was initially employed by RCBE in the classification of Sanitation Plant Operator on March 10, 1986. On July 1, 1992, Grievant was reclassified as a Foreman/Sanitation Plant Operator.

3. In addition to holding a license from the West Virginia Department of Health as a Class I Waste Water Treatment Plant Operator, Grievant is trained and licensed in asbestos removal and application of herbicides and pesticides. At the time Grievant'semployment was terminated, RCBE had other employees trained in asbestos removal but not in herbicide or pesticide application.

4. Based upon application of the state funding formula, RCBE determined that it was required to eliminate a number of service personnel positions in order to avoid a deficit financial situation. After review of all service personnel positions in the county, the Superintendent proposed eliminating four positions in the Maintenance Department, including both positions in the Sewage Treatment Plant. In addition, the employment terms of two remaining employees in the Maintenance Department were recommended for reduction. See R Ex 19.

5. On March 11, 1996, Grievant was issued written notice that the Superinten dent was proposing to eliminate his position, and that he would be terminated pursuant to a reduction-in-force, because he did not have sufficient seniority to be retained in any of his classifications. See R Ex 18 at L II.

6. Grievant requested a hearing on his proposed termination. RCBE conducted a hearing on March 26, 1996, wherein Grievant appeared with counsel and presented evidence regarding his proposed termination. RCBE thereafter voted to terminate Grievant's employment due to a reduction-in-force, effective June 30, 1996. Grievant was issued written notice of the county board's decision on March 29, 1996. See R Ex 20 at L II.

7. Norman Pannell was also employed by RCBE as a Sanitation Plant Operator. Mr. Pannell has less seniority than Grievant, and his position was also eliminated. 8. Dennie Worley is employed by RCBE in the classification of Foreman. Mr. Worley's seniority date as a

Foreman is February 16, 1989, making him senior to Grievant in that classification of employment.

9. Sometime prior to June 24, 1996, RCBE issued Invitation to Bid Number 96- 31 for contracted services to treat sewage and drinking water at various RCBE facilities from July 1, 1996, through June 30, 1997. Don's Decks was the successful bidder on this contract. See G Ex 1 at L IV.

10. Grievant submitted a bid in response to the Invitation for Bid described in Finding of Fact Number 8. However, Grievant was not the low bidder.

11. On April 15, 1997, RCBE issued Invitation to Bid Number 98-01 for contracted sewage and water treatment services at RCBE's facilities from July 1, 1997, through June 30, 1998. See G Ex 4 at L IV. Grievant was the low bidder and was awarded this one-year contract. See G Ex 6 at L IV.

12. Patricia Bailey is employed by RCBE as a Custodian III assigned to Clear Fork Elementary School. Ms. Bailey was first employed by RCBE as a Custodian III in 1991. Shortly after Ms. Bailey was hired, she was required to obtain and maintain a license as a Class I-D water operator in order to test water samples from the water system operated by RCBE at Clear Fork High School. Ms. Bailey was transferred to Clear Fork Elementary School in 1993 where she again tested water samples from the water system operated by RCBE at that location.

13. After Grievant's employment was terminated and an independent contractor was hired to treat water and sewage for RCBE on July 1, 1996, Ms. Bailey continued sampling and testing water at Clear Fork Elementary School at the request of DonaldMiller, the proprietor of Don's Deck's, the successful bidder to treat RCBE's water and sewage. Ms. Bailey performed these services under the license of Robert Zimmerman, a subcontractor to Don's Decks who performed certain duties required by the water and sewage treatment service contract with RCBE. Mr. Miller offered to pay Ms. Bailey extra to come in before her normal working hours and test water at Clear Fork Elementary. However, Ms. Miller's supervisors advised her that she should continue testing water samples as part of her duties as a Custodian.

14. During the 1996-97 school year, RCBE saved in excess of $20,000 by eliminating the positions of Grievant and Mr. Pannell, and assigning their duties to an independent contractor

and other RCBE employees.

15. Grievant assisted RCBE's Director of Maintenance, Gilbert Pennington, in drafting the bid specifications to be included in the Invitation for Bid soliciting potential independent contractors to provide water and sewage treatment services for RCBE.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Since the point in time when RCBE attempted to reconvene the previously adjourned Level II hearing in this matter, Grievant has repeatedly claimed that he is entitledto prevail in this grievance by default in accordance with W. Va. Code § 18-29-3(a), which states in part:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, 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.

This Grievance Board has determined that it does not have jurisdiction to enforce a default by an employer that occurred at the lower levels of the grievance procedure, or otherwise make any rulings upon a level four request or motion by a grievant that an employer should lose by means of a default. Smith v. Bd. of Directors, Docket No. 93- BOD-051 (Feb. 17, 1993). Accord, Bennett v. Randolph County Bd. of Educ., Docket No. 96-42-234 (Dec. 29, 1997); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993). However, should the employer appeal the employee's default declaration on the narrow grounds that the remedy received is contrary to law or clearly wrong, this Grievance Board has jurisdiction to decide such an appeal. Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994). In the instant matter, RCBE made no such appeal.

This Grievance Board generally follows the well-recognized legal doctrine of stare decisis (See footnote 2) in ruling upon grievances. Accordingly, this Board's prior decisions in Smith, Bennett, and Chaffin, inter alia, require the undersigned administrative law judge toconclude

that the proper forum for enforcing any purported default is the appropriate circuit court.

The merits of this grievance involve a complaint that RCBE did not properly eliminate Grievant's position as a Foreman/Sanitation Plant Operator because his duties were subsequently divided among one or more custodial employees and an outside contractor. Accordingly, Grievant contends his position was not eliminated due to lack of need, and the action by RCBE was arbitrary and capricious. RCBE contends that its actions were motivated by financial considerations resulting from application of the state aid formula. Such financial circumstances beyond RCBE's control necessarily required appropriate action to avoid a deficit situation. See Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); Dial v. McDowell County Bd. of Educ., Docket No. 96-33-259 (Apr. 30, 1997). RCBE does not contend that Grievant's duties were eliminated, conceding that Grievant's myriad duties as a Foreman/Sanitation Plant Operator must still be accomplished by some other means.

"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, and in a manner which is not arbitrary and capricious." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with Dillon, county boards have discretion to determine the number of positions it will fill, and the employment terms of any such positions. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994); Byrd, supra; Drown v. Cabell County Bd. of Educ., Docket No. 96-06-323 (Feb. 28,1997). See Dial, supra. In this regard, W. Va. Code § 18A-4-8 provides specific authority for county boards to conduct a reduction in force in the following terms:

> Should a county board of education be required to reduce the number of employees within a particular job classification, 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 in that job 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 shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

Also pertinent to this grievance is the following portion of W. Va. Code § 18A-4-8g:

> School service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee

> **holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based upon the seniority accumulated within said category of employment: Provided, That if a multi- classified employee is reduced in force in one classification category, said employee shall retain employment in any of the other classification categories that he holds within his multi-classification title. In such a case, the county board of education shall delete the appropriate classification title or classification category from the contract of the multi-classified employee.**

Thus, a board of education must necessarily consider seniority when making reductions permitted under W. Va. Code § 18A-4-8b. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994); Bell v. Kanawha County Bd. of Educ., Docket No. 96- 41-169 (Dec. 31, 1996).

In this matter, RCBE followed all applicable statutory procedures, notifying Grievant of his proposed RIF, affording him a hearing on that proposed action, and promptly deciding to proceed with eliminating Grievant's position, resulting in the termination of his employment. No employees with less seniority in any classification held by Grievant wereretained by RCBE. Nonetheless, Grievant suggests that his termination was arbitrary and capricious because RCBE subsequently continued to accomplish the duties he had performed through an independent contractor who received assistance in accomplishing certain tasks from a Custodian employed by RCBE.

The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Moreover, in determining whether a personnel decision of a county board of education was arbitrary and capricious or an abuse of the board's substantial discretion in such matters, a reviewing authority must limit its inquiry to the information the board had in its possession, or should reasonably have been expected to acquire, as of the time the decision at issue was made. See State ex rel. Bd. of Educ. v. Casey, 176 W. Va. 733, 349 S.E.2d 436 (1986). In the instant matter, the county board was required to make a decision on Grievant's retention not later than the first Monday in May, the statutory deadline set forth in W. Va. Code § 18-2-7. See Collins v. Mingo County Bd. of Educ., Docket

No. 97-29-328 (Jan. 28, 1998). As of the time RCBE decided to approve Grievant's termination through the RIF process, there is no evidence that this decision resulted from any consideration other than the board's financial situation.

Grievant presented evidence regarding various anomalies that occurred in the school board's process of hiring an independent contractor. None of this evidence warrants a finding that RCBE's plan to reduce its financial deficit by hiring a contractor toperform certain of Grievant's duties, while assigning other duties to remaining employees in other classifications, was so flawed as to violate the arbitrary and capricious standard of review. In particular, Ms. Bailey's duties testing water at Clear Fork Elementary were substantially the same prior to and after Grievant's termination. RCBE violated no law, rule, policy, or regulation related to the employment status of Ms. Bailey or Grievant by assigning her duties relating to water sampling and testing. See Snell v. Mingo County Bd. of Educ., Docket No. 97-29-154 (Aug. 13, 1997). Likewise, any rules of the Board of Health which arguably may have been violated when Ms. Bailey was not working under the supervision of a Class I-A Operator during early July 1996, have no bearing on the propriety of RCBE's personnel decision in April 1996 to terminate Grievant's employment.

RCBE rationally determined that it did not require two full-time service employees to perform water and sewage treatment services, and there was a cost-effective alternative approach to accomplishing this work involving hiring of an independent contractor. Thus, Grievant failed to demonstrate any legal entitlement to remain in his former position as a Foreman/Sanitation Plant Operator. See Bd. of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990). No provision in the school laws governing employment of school service personnel prohibits a county board from contracting out services. See Allison v. Mason County Bd. of Educ., Docket No. 26-87-243 (Jan. 29, 1988); Russell v. Mason County Bd. of Educ., Docket No. 26-86-335-1 (June 26, 1987). See also Moss v. Barbour County Bd. of Educ., Docket No. 89-01-386 (July 26, 1990). Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. &

State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A county board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code § 18A-4-8 are met. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994); Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997); Drown v. Cabell County Bd. of Educ., Docket No. 96-06-323 (Feb. 28, 1997).

4. W. Va. Code § 18A-4-8b generally provides that county boards of education required to reduce the number of employees in a particular job classification, will take such reduction-in-force (RIF) actions on the basis of seniority. W. Va. Code § 18A-4-8g further provides that multi-classified employees are subject to RIF in any category of employment included within their multi-classification title on the basis of seniority. Grose v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997). See Williams v. Raleigh County Bd. of Educ., Docket No. 96-41-169 (Dec 31, 1996). 5. Grievant failed to establish that the Raleigh County Board of Education (RCBE) violated W. Va. Code §§ 18A-4-8b or 18A-4-8g when it terminated his employment by eliminating his position as a Foreman/Sanitation Plant Operator through the RIF process. See Grose, supra; Williams, supra. See also Shahan v. Preston County Bd. of Educ., Docket No. 92-39-213 (Dec. 29, 1992).

6. Grievant failed to demonstrate by a preponderance of the evidence that RCBE acted in an arbitrary and capricious manner, or otherwise violated any law, statute, regulation or policy in regard to the elimination of his position and the termination of his employment through the RIF procedure authorized in W. Va. Code § 18A-4-8b.

Accordingly, this grievance is DENIED.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 26, 1998

Footnote: 1

That record includes a "transcript" of the reduction-in-force hearing conducted by RCBE on March 26, 1996, the Level II hearing transcripts, and the testimony and evidence presented at Level IV. Grievant complained at Level IV that the witnesses who appeared before the county board were not sworn, nor was a court reporter present. The testimony was nonetheless transcribed verbatim and submitted as part of the record. Contrary to Grievant's contentions, there is no requirement in W. Va. Code § 18A-2-6, or any other pertinent statute, that testimony in a personnel hearing before a county board of education be taken under oath, or in the presence of a certified court reporter. In any event, such a deficiency did not deprive Grievant of any due process of law to which he was entitled in the circumstances.

Footnote: 2

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. Black's Law Dictionary 1577 (Rev. 4th Ed. 1968).