LOUISE BYERS

v. Docket No. 94-24-388

MARION COUNTY BOARD OF EDUCATION

D E C I S I O N

Louise Byers, a substitute aide employed by Respondent Marion County Board of Education (MCBE), protests a policy, adopted by MCBE in 1993, which provides that service employees who have been reduced in force and placed on a "Preferred Recall" list are to be called out for substitute work before substitute workers under certain circumstances. Although a hearing had been initially sought at level four, the parties later agreed that a decision could be rendered based on the evidentiary record compiled at the lower grievance levels, supplemented with written argument. The case became mature for decision on December 18, 1995, the cut-off day for the submis sion of fact/law proposals and/or rebuttals.1

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1Of record are the lower-level pleadings and adverse decisions, as well as the transcript/exhibits of the October 19, 1993, level two hearing.

Procedural History

Before proceeding further, the case's procedural history must be presented. Grievant initiated this grievance at level one on or about October 5, 1993. On October 8, 1993, Assistant Superintendent Dennis Edge responded in writing that he was without authority to address the grievance. Grievant then appealed to level two. An evidentiary hearing was conducted by the grievance evaluator, Assistant Superintendent Nathan

Crescenzi, on October 19, 1993, but Mr. Crescenzi did not issue a decision until October 29, 1993. He essentially supported MCBE's adoption of the policy but, in the final analysis, declined to rule on the merits of the case. He summarized, "I propose that this Grievance be moved to the next level as it would place me in a position to over rule [sic] the Board." When she did not receive the level two decision within the five-day period designated in the grievance statute,2 Grievant filed a Petition for a Writ of Mandamus in the Marion County Circuit Court, Civil Action No. 94-P-47. Grievant sought enforcement of a default and to obtain the relief requested in her grievance, pursuant to W.Va. Code §18-29-3(a). Following a hearing before Judge Fred E. Fox, II, on June 7, 1994, MCBE's counsel drafted an Order reflecting the outcome of the hearing. However, Grievant's counsel was unable to review the order prior to its entry on June 12, 1994.

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2See W.Va. Code §18-29-4(b).

Essentially, the June 12, 1994 Order acknowledges that Mr. Crescenzi did not comply with Code §18-29-4(b)'s five day time limit to issue a level two decision and that there was no written agreement between the parties to extend the deadline. However, conclusions set forth in the Order were that MCBE "did not default in its responsibility to issue" the decision in question and that it should not be precluded from presenting its defense before a hearing examiner of the West Virginia Education and State Employees Grievance Board.3 MCBE was given five days from entry of the Order to request a hearing on the merits of the case at level four. The Order concludes that, "[s]ubsequent

to the Court's ruling," MCBE moved for a stay of the Order for thirty days, and the motion was granted.

MCBE's counsel filed a level four grievance appeal on or about August 8, 1994, and requested a hearing. Thereafter, an extended period followed in which Grievant's counsel attempted to seek clarification of Judge Fox's June 7, 1994, oral order relative to the June 12, 1994, written order. In September 1995, Grievant's counsel stated he would not pursue the default issue further and requested a hearing. Several hearings were

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3W.Va. Code §18-29-3(a) provides that, "[i]f a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required . . ., 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. In making a decision regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and that the remedy is contrary to law, or clearly wrong, in light of that presumption."

scheduled, but continued at the parties' request, for cause shown. Finally, in November 1995, the parties agreed to submit the case for decision based on the evidence adduced below. This delay in the processing of the grievance is of some importance, primarily because of some assertions made by MCBE's counsel in his level four fact/law proposals.

Background

According to Mr. Edge, in Spring 1993, MCBE terminated the

contracts of seventeen "regular" service personnel in a major reduction in force action and placed them on a preferred recall list. By the time the 1993-94 school year began in Fall 1993, three aides and three secretaries who had been reduced in force remained on the preferred recall list. T.12. While it is unclear from the record whether these three persons were ever formally hired/rehired as substitute workers, they were placed on the substitute call-out list for the 1993-94 school year.4 Prior to the 1993-94 school year, it had been the practice at the beginning of each school year to begin the rotational call-out of substitute aides with the person who would have been next in line the previous school year. However, the three preferred recall aides complained and alleged the practice was violative of W.Va. Code §18A-4-8b. They threatened to file a grievance. On September 2, 1993, MCBE ordered the three aides

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4It may be that the three preferred recall aides had been substitute employees prior to being regularly-hired for full-time work. Administrative notice can be taken that at least some substitute service employees are interested in ultimately gaining regular employment.

in question to be placed at the top of the substitute aide list. School administrative staff were also directed to call the three aides for available substitute assignments before calling any substitute service personnel. T. 12-13.

Grievant and other substitute aides then complained that the new practice was violative of W.Va. Code §18A-4-15. Grievant, in fact, attended a MCBE meeting and asked that the practice be changed. T.6. Because of the controversy, MCBE

directed its superintendent and Mr. Edge to meet with the two groups of employees and work out a compromise that would satisfy both. With what Grievant maintained was very little input from her faction, the two administrators prepared a proposal for MCBE's approval. T.6-7. MCBE adopted the proposal on September 27, 1993, by a four to one vote.

Discussion

The controversy in this case involves MCBE's "Substitute Aide/Secretary" policy and portions of W.Va. Code §§18A-4-8b and 18A-4-15. The Policy, in its entirety, is as follows:

SUBSTITUTE AIDE/SECRETARY

1. Effective immediately, substitute aides and secretaries shall be called in rotation fashion as per the requirements of WV Code 18A-4-15.

2. Marion County Schools shall begin calling at the top of the substitute service list each school year (July 1), effective July 1, 1994.

3. Preferred Recall employees (three aides, 3 secretaries) shall be offered substitute employment in rotating order for extended absences meeting the following criteria:

A. An employee suspension for more than five days.

B. A position involving temporary day to day cover age that becomes vacant due to employee transfer or resignation shall be assigned to a Preferred Recall employee on the date the position is posted and shall remain until filled by board action.

C. Any absence known at the time of the original

request to extend beyond 5 working days.

Relevant portions of Code §18A-4-8b state the following:

A county board of education shall make decisions affecting. . .filling of any service personnel posi tions. . .on the basis of seniority, qualifications and evaluation of past service.

* * *

Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section[.]

* * *

(4) Substitute service personnel . . . .

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No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Pursuant to Code §18A-4-15, "[t]he county board shall employ and . . . assign substitute service personnel on the basis of seniority" to temporarily fill in for absent regular employees under a variety of circumstances. The statute makes clear that substitute employees must be hired by contract, that they accrue substitute seniority from the time they enter upon their duties as a substitute in a particular classification and that, after thirty days' substitute work, the worker attains some contract rights. Substitute work is temporary work,

generally arising from the short-term, day-to-day absence of a regular employee or the longer-term, extended absence of a regular employee on paid or unpaid leave. See §18A-4-15, subsections (1), (2), and (3). Substitutes also may be temporarily assigned to fill a true vacancy, brought on by the resignation, transfer, retirement, permanent disability or death of a regular employee, §18A-4-15(4), or by the creation of an entirely new position, §18A-4-15(6), until a regular employee can be hired via the hiring procedures in §18A-4-8b.

Under §18A-4-15(5), a substitute assigned to fill in for a suspended regular employee must be granted regular employee status if the suspension exceeds thirty days. However, under §18A-4-15(2), in instances when the regular employee's absence or leave of absence is known to be more than thirty days in duration, or eventually exceeds thirty days (generally, an "approved" leave of absence), the board must post and fill the job pursuant to §18A-4-8b and grant regular status to the person hired for the job, until such time as the regular employee returns to work.

Finally, Code §18A-4-15 mandates that

Substitutes shall be assigned in the following manner:

A substitute with the greatest length of service time, . . . shall be given priority in accepting the assign ment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in . . . [§18A-4-8b]. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportu nity to perform similar assignments. . . .

When she initiated this grievance, Grievant requested that MCBE implement "full rotation" of all workers on the substitute list, define "extended" or "long-term" absences as only those absences which exceed thirty days and award her appropriate "back pay due to improper rotation of the [substitute] list."

As set forth in Grievant's level four brief, the only part of the policy she challenges is Section 3. Section 3 identifies extended absences as absences over five days in duration and gives the preferred recall aides priority for those assignments. Grievant concludes, "All school personnel laws and regulations must be strictly construed and in the favor of the employees they are designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979)."

In his level four fact/law proposals, MCBE's counsel claims that, during the pendency of this grievance, all service employ ees on the preferred recall list had been reemployed. MCBE further maintains that no aides remained on the preferred recall list at the beginning of the 1994-95 school year, and that the policy in question had not been utilized for the past two years.5 The upshot of this, MCBE insists, is that Grievant's case is moot. In this vein, the only benefit Grievant would derive, should she prevail, would be an advisory opinion, something the Grievance Board will not issue. MCBE concludes that, even if it could be shown that the policy was violative of any law, Grievant is not entitled to monetary relief because she failed to present any evidence with regard to damages.

The merits of this case must be reached, especially with regard to the policy in question. Essentially, there is no competent evidence in the record to support the assertions made by MCBE's counsel in his fact/law proposals regarding the

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5MCBE filed its fact/law proposals on or about December 11, 1995, while Grievant filed hers on December 13.

employment status of the preferred recall aides. Additionally, there is no evidence as to when the policy was last utilized to assign aides to perform substitute work. Nor did the parties enter into any stipulations about these facts. Therefore, the information in MCBE's fact/law proposals about these two matters must be discounted. Given the circumstances, the record does not substantiate MCBE's claim that the grievance is moot or that the only relief available is an advisory opinion.

Clearly, MCBE's policy and practice of taking preferred recall aides, or any other similar service employees, "out of rotation" on the substitute list and giving them all of the substitute jobs of five or more days' duration is violative of Code §18A-4-15. Moreover, nothing in Code §18A-4-8b gives employees on the preferred recall list preference rights over substitute employees for temporary, substitute assignments of five days or longer.6 Among other things, Code §18A-4-8b deals with the recall rights of regular workers who have been reduced in force and who have preferred status for true vacancies, whether permanent or temporary.

MCBE has placed too much emphasis on the word "temporary" in this statute. In context, the word temporary means a tempo rary regular position and not a temporary "substitute" position.

6There is nothing in Code §18A-4-15 which would preclude MCBE from establishing a rotational system for true "short-term" substitute assignments (one to four days) and a separate

rotational system for longer-term substitute jobs (five to twenty-nine days). What is important is that no specific group of employees should be taken out of rotation and given priority for these jobs.

For example, a temporary regular position could be a job at a particular school that will end in a year due to the school's closing. There is nothing in Code §18A-4-15 which provides for the placement of a substitute worker under that circumstance. For those occasions when certain temporary substitute positions are available, Code §18A-4-15 provides that the jobs should be posted and filled pursuant to Code §18A-4-8b. Only under those circumstances would regular service employees and those on preferred recall have priority over substitute service employees for the jobs.

While Grievant has established that the policy in question is unlawful, she has not provided any evidence of her own particular damages, if any. Grievant, as well as MCBE, had every opportunity to present evidence at level four at a hearing or via any other agreed-upon means, such as stipulations, depositions or the submission of documents. This was not done at level four. Therefore, Grievant has not established all of the elements of her grievance, and her request for back wages cannot be granted. See Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

In addition to the foregoing, the following findings and conclusions are appropriate.

Findings of Fact

1. Grievant was a substitute aide during the 1993-94 school year.

2. During the 1993-94 school year, MCBE adopted a policy and practice in which aides on the preferred recall list were given priority over other substitute workers for substitute assignments lasting five days or more.

3. While it is accepted that Grievant may have been adversely affected by MCBE's policy and practice to give pre ferred recall aides substitute assignments out of rotation, she presented no work records or other documentation to identify specific times and incidents when this occurred.

Conclusions of Law

1. A grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. MCBE's policy and practice of taking certain substi tute workers (preferred recall employees) out of rotation and giving them priority for any and all substitute jobs of five days or more is violative of Code §18A-4-15 and, moreover, does not comport with the requirements of Code §18A-4-8b.

3. Grievant failed to establish or substantiate any specific instances when she was adversely affected by MCBE's policy; therefore, she failed to prove every element of her claim.

Accordingly, the grievance is GRANTED, in part, and MCBE is Ordered to rescind the policy and cease the practice of taking any substitute workers (preferred recall employees) out of rotation and giving them priority to fill certain substitute assignments of five days or more. No other relief is granted.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: December 29, 1995