

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

REBECCA SHANKLIN,
Appellant,

v.

Appeal No. _____
Civil Action No. 10-AA-25

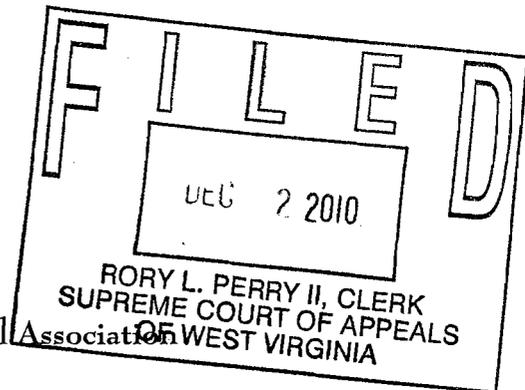
2010 NOV 24 PM 3:48
CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,
Appellee,

PETITION OF APPEAL TO THE WEST
VIRGINIA SUPREME COURT OF APPEALS

John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173



I. Procedural History

On or about April 14, 2009, Appellant filed an employment grievance at level I pursuant to West Virginia Code §6C-2-1, et seq. By written agreement of the parties, the grievance was waived to level III. Appellant filed an appeal to level III in accordance with that agreement on May 9, 2009. Karen Harper, another general maintenance employee who had been reduced-in-force by the Appellee, filed a request to intervene in the grievance May 12, 2009. Administrative Law Judge Mark Barney conducted an evidentiary hearing at level III on August 17, 2009. By decision dated December 28, 2009 and received December 30, 2009, Mr. Barney denied the grievance filed by Appellant and Ms. Harper. Appellant filed the current appeal to the Circuit Court of Kanawha County pursuant to West Virginia Code §6C-2-5 on January 28, 2010. Due to local court rule, separate petitions of appeal were filed on behalf of Appellant and Ms. Harper. Ms. Harper's appeal was assigned to another judge and is currently pending in the Circuit Court of Kanawha County. By order entered July 28, 2010, the circuit court denied the Appellant's appeal. Appellant seeks judicial review of the order and a reversal of the decision.

II. Statement of Facts

Rebecca Shanklin, Appellant, is currently employed by Appellee as a cook. The Board of Education of the County of Kanawha, Appellee, is a quasi-public corporation created by statute for the management and control of the public schools of Kanawha County, West Virginia.

Appellant was employed by the Appellee as a General Maintenance employee prior to July 1, 2009. During the 2008-2009 school year, Appellee employed four employees with contracts of

employment in the General Maintenance classification. Appellant was the second most senior employee after Barbara Isaacs. All of these employees were female.

By letter dated March 18, 2009 Appellee notified Appellant and the other three women who were employed as General Maintenance employees, that they would be reduced in force for the 2009-2010 school year. Appellant and Barbara Isaacs, one of the other General Maintenance employees, requested a hearing on their proposed lay-off. The hearing was held on March 26, 2009. Appellee approved the recommendation to lay off Appellant and the other three women in the General Maintenance classification.

Appellee retained Donald Enis, a multiclassified employee with the classification of Electrician II/General Maintenance for the 2009-2010 school year. Mr. Enis had less seniority than Appellant and Ms. Harper in the General Maintenance classification. Mr. Enis transferred to an Electrician II position prior to July 1, 2009, but was replaced by another employee with the classification of Electrician II/General Maintenance, Robert Keener. Mr. Keener also had less seniority than Appellant in the General Maintenance classification.

Several days prior to the level III hearing, Mr. Keener agreed to the deletion of the General Maintenance classification from his contract. There is no evidence in the record that the Appellee ever voted to approve the deletion of the General Maintenance classification title from Mr. Keener's employment contract.

Appellant feared that her work/position would be assumed by substitutes and brought that issue out at the statutory hearing before the board of education. Appellee apparently also

perceived this possibility.¹ In fact, it may well have planned this possibility. Appellee approved the termination of Appellant and the other three women employed as General Maintenance employees.

Appellant's fear that she and the other General Maintenance employees would be replaced by substitutes proved to be well founded. An examination of the use of substitutes in the maintenance department after July 1, 2009 indicates that many substitutes worked in "open" positions and as "extra help/vacancy".² Further, substitutes are often called to substitute for an absent employee, but actually work in an entirely different position. If a substitute in a skilled craft (electrician, plumber, etc.) cannot be found, a General Maintenance substitute is called to work and assigned somewhere in the maintenance department performing "unskilled"³ work or helping skilled employees in another craft.⁴ As a General Maintenance employee, Appellant performed unskilled work and assisted skilled employees in various crafts. Appellant is also qualified as a Crew Leader and has acted in that capacity for a summer maintenance crew.

The reduction-in-force of Appellant and her three colleagues eliminated all of Appellee's *regular* employees who held only the "General Maintenance" classification title. Strangely, Appellee retained a number of substitutes who only held the "General Maintenance" classification title. The reduction-in-force also eliminated all women from Appellee's maintenance department outside of clerical classifications except for a single female painter.

¹ See Transcript of March 26, 2009 hearing pp. 49-51.

² See Grievant's Exhibit #1 at Level III and Appellee's Exhibit #3 at Level III.

³ It is not the intention of the undersigned to denigrate the work performed by these individuals. It is "unskilled" only in the sense that it does not require a licensed electrician, plumber, or other craftsman to perform the work.

⁴ Jerrod Edwards and J. T. Gross worked with the grounds crew and in the carpenter shop. Fred Moomaw worked with the roofers' crew. Bill Long worked with the moving crew. Charles Swiggert fueled vehicles in the evening.

III. Citation of Error

a. The Circuit Court and the Administrative Law Judge erred in holding that Appellant was not entitled to reinstatement to her General Maintenance position on the basis that Appellee had retained a less senior employee with the General Maintenance classification because Appellant was not the most senior General Maintenance employee who was reduced-in-force.

b. The Circuit Court and the Administrative Law Judge erred in holding that Appellant had failed to establish that a need for her position continued to exist.

IV. Citation of Authority

- A. West Virginia Code §6C-2-5
- B. West Virginia Code §18A-4-8b
- C. West Virginia Code §18A-4-8g
- D. West Virginia Code §18A-4-10(b)(3)
- E. West Virginia Code §18A-4-15
- F. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989)
- G. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399 (W.Va. 1995)
- H. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979)
- I. Taylor-Hurley v. Mingo County Board of Education., 551 S.E.2d 702 (W.Va. 2001)

J. Honaker v. Board of Education, 24 S.E. 544 (W.Va. 1896)

V. Argument

Prior to addressing the issues peculiar to this case, Appellant will address two general issues common to all administrative appeals from the West Virginia Public Employees Grievance Board. The first of these issues is the standard of review that this court must apply to this case. The second is the statutory construction to be applied to school personnel laws.

▪ STANDARD OF REVIEW

This appeal is controlled by West Virginia Code §6C-2-5. The language of this provision is virtually identical to the language formally found in West Virginia Code §18-29-7, which related to appeals to circuit court of grievance board decision by administrative law judges under the previous statutory grievance procedure. As a consequence of this affinity, case law interpreting West Virginia Code §18-29-7 is applicable to West Virginia Code §6C-2-5.

In construing the former section of law the West Virginia Supreme Court of Appeals held that the standard of review is two fold. First, judicial review of a decision on factual issues is similar to the standard of review under the Administrative Procedure Act, § 29A-5-4, in that both require that evidentiary findings made at an administrative hearing not be reversed unless these findings are clearly wrong. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989) On legal issues or the application of the law to facts, decisions are reviewed *de novo*. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399 (W.Va. 1995)

▪ STATUTORY CONSTRUCTION

The long-standing rule regarding statutory construction of laws and regulations dealing with school personnel is that such laws and regulations are to be strictly construed and in favor of the employee(s) that the law or regulation is designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Now let us proceed to the specific issues raised by this appeal.

A. APPELLANT IS ENTITLED TO REINSTATEMENT ON THE BASIS THAT APPELLEE RETAINED A LESS SENIOR EMPLOYEE WITHIN THE GENERAL MAINTENANCE CLASSIFICATION.

With regard to the process for reduction in force or lay-offs, West Virginia Code §18A-4-8b(j) provides:

If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply:

(1) 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;

(2) If there is no job vacancy for employment within that classification or grades of classification, the service person shall be employed in any other job classification 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.

In the current case, the less senior employee retained by Appellee in the General Maintenance classification held that classification as a part of a multiclassification title. Hence, West Virginia Code §18A-4-8g(l) is applicable to this situation. It provides:

A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title. A multiclassified service person is subject to reduction in force in any category of employment contained within his or her multiclassification title, based upon the seniority accumulated within that category of employment. If a multiclassified service person is subject to a reduction in force in one classification category, the service person retains employment in any of the other classification categories that he or she holds within his or her multiclassification title. In that case, the county board shall delete the appropriate classification title or classification category from the contract of the multiclassified employee.

The West Virginia Supreme Court of Appeals addressed the application of the above-quoted statutory language in Taylor-Hurley v. Mingo County Board of Education, 551 S.E.2d 702 (W.Va. 2001). The fact pattern in Taylor-Hurley is very similar to the present case. In Taylor-Hurley, a school service employee holding the classification of Secretary II contested her reduction-in-force based upon the retention of less senior secretaries. These other employees held the classification title of secretary as part of a multi-classification title. In fact, except for the difference in the actual classification titles held by the employees, the Taylor-Hurley case is identical in all factors pertinent to the legal question presented by the current case. In Taylor-Hurley the court held that multiclassified school service personnel:

- a. do not belong to a separate classification category, but are employees of each classification category contained within their multiclassification titles;
- b. are subject to a reduction in force in any individual job classification category, based on seniority accumulated within that category; and

- c. in the event of a reduction-in-force, remain in the employ of the county board of education with any classification categories that are subject to the reduction in force deleted from their multiclassification titles.

In short, this Court confirmed that West Virginia Code §18A-4-8g(l) makes it clear that multiclassified employees are not exempted from a reduction-in-force in one or more of the classification categories within their classification titles. Further, Taylor-Hurley makes it clear that failure to reduce in force or delete the classification title of such a multiclassification employee invalidates the reduction-in-force of more senior employees within the classification in question.

The sham action of Appellee obtaining the agreement of Robert Keener to drop the General Maintenance classification title from his contract should not impact this grievance at all. There is nothing in the record to confirm this action. The Administrative Law Judge and the Circuit Court correctly disregarded this action on the part of Appellee.

The Administrative Law Judge and the Circuit Court seemed to agree with all of the foregoing analysis. However, both the Administrative Law Judge and the Circuit Court denied relief to Appellant based on the fact that she was not the most senior of the General Maintenance employees who were reduced-in-force. Appellant asserts that this conclusion is erroneous on two points.

First, this case involves a lay-off and not the filling of a particular position. Let us suppose that a board of education posts a position and violates the law in filling it. It is true that there is only one candidate for the job who is entitled to the position by law. In the current case, the

board of education retained a less senior employee and laid off four more senior employees. The reduction-in-force of each of these employees constitutes a separate violation. Each one, including Appellant, is entitled to reinstatement.

Secondly, Ms. Isaacs did not grieve her reduction in force and it is far too late for her to do so at this point. This failure to contest her termination amounts to a waiver of any rights she might have held and extinguishes her claim to reinstatement as a General Maintenance employee. However, Ms. Isaacs' failure to challenge her reduction-in-force does not act as a bar to the filing of a grievance by the Appellant or to any relief that could be granted to Appellant. The Administrative Law Judge did not order Ms. Isaacs' reinstatement. Indeed, he probably didn't have the authority to do so. Hence, his indication that Ms. Isaacs should have been retained and that Appellant has no right to reinstatement because of Ms. Isaacs existence is merely a cruel joke.

B. APPELLANT HAS ESTABLISHED THAT THERE WAS A NEED FOR HER POSITION IN GENERAL MAINTENANCE.

West Virginia Code §18A-4-8b(j) permits reduction-in-force on the basis of a lack of need for the services of employees within a particular classification. Appellant has proven not only that there is a need for her services, but also that Appellee is filling that need with other employees. Even Mr. Hollandsworth, the head of Appellee's maintenance department, admitted that the work performed by Appellant and the three other General Maintenance employees still needed to be done. However, Appellee intended to have that work done by substitute employees. In short, Appellee did not terminate four General Maintenance positions. It terminated four sets of benefits, i.e., insurance, retirement, etc. Substitute employees will step into the positions

formally performed by Appellant. These employees will have the same classifications as Appellant, i.e. General Maintenance. These employees will perform the same work, i.e., "unskilled" labor such as moving furniture and assisting skilled craftsman. The only difference is that as substitutes, they will be without insurance, without retirement, without accrued personal leave, without holiday pay, etc. In short Appellant's replacements will be bereft of all the benefits, which the Legislature has granted to regular employees over the years. Appellant contends that the reduction-in-force procedure is in place to permit a reduction of the number of employees in a classification, not as a means of replacing regular employees with substitute employees.

We must also note that Appellee's scheme is not only malicious, it also happens to be illegal. Substitutes are not permitted by West Virginia Code §18A-4-15 to permanently replace regular employees. A substitute can temporarily replace an absent employee who is still under contract and is absent on a temporary basis. A substitute can also fill in a vacancy in a newly created position or in a position vacated by the regular employee retiring, resigning, etc. However, the latter is only permitted during the process of posting and filling the position on a permanent basis. The Code does not contemplate a substitute indefinitely filling in a position that belongs to no one. In short, a substitute cannot be utilized in a position that does not officially exist.

It should be noted that a board of education created under this section can exercise no power not expressly conferred or fairly arising from necessary implication; and in no other mode than that prescribed or authorized by the statute. Honaker v. Board of Education, 24 S.E. 544 (W.Va. 1896). Further, we must bear in mind the cardinal principle of statutory construction "*inclusio unius est exclusio alterius*" ("the inclusion of one is the exclusion of others"). Thus, in

enumerating the situations in which a substitute service employee may be utilized, West Virginia Code §18A-4-15 prohibits use of substitute service personnel in all other situations.

The undersigned realizes that he may be accused of pushing this argument *ad absurdum*. However, he cannot help but note that if Appellee is permitted to follow this “Wal-Mart” model in the current case, the practice is likely to spread. Appellee would have no reason to have *any* regular employees if the jobs could be handled by substitute employees.

Appellant also takes issue with the sham process of bringing in a General Maintenance substitute to “replace” an absent electrician and then assigning the substitute to perform General Maintenance duties. A board of education is not required to employ a substitute whenever an employee is absent. [See West Virginia Code §18A-4-10(b)(3)]. Therefore, if a suitable substitute for a skilled maintenance employee cannot be had or if a substitute is not needed for a position, then a substitute should not be called to work and assigned to work in a completely different position. This is just another way of performing the duties formerly performed by Appellant and the other three women with substitutes.

One final observation is in order. Appellee has no legitimate use for substitutes who are General Maintenance *only*, when it has no regularly employed General Maintenance *only* employees. There is no one for whom the substitute General Maintenance employees may legally substitute. Certainly, they will not be replacing General Maintenance employees. No such positions exist according to Appellee. Of course, we are being purposely blind to make a point. There is a real need for employees to perform the duties in General Maintenance. However, that real need should be filled by regular employees in the General Maintenance classification. The

mere existence and frequent use of substitute General Maintenance *only* employees gives lie to the Appellee's whole premise that it had no need for regular General Maintenance employees.

Appellant request that this Court hear this appeal and reverse the decision of the Administrative Law Judge and the Circuit Court, reinstate Appellant to the position of General Maintenance employee with retroactive back pay and all benefits, pecuniary and nonpecuniary, with interest. Appellant also seeks an award of cost and reasonable attorney's fees.

REBECCA SHANKLIN, Appellant
Respectfully submitted,

By counsel,



John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173

CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served the original and nine copies of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals" on the following by hand-delivery, on this the 24th day of November 2010, to:

Cathy Gatson, Clerk
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301

Further, I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served a true copy of the foregoing "Petition of Appeal to the West Virginia Supreme Court of Appeals" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 24th day of November 2010, to:

James Withrow, Esq.
Kanawha County Schools
200 Elizabeth Street
Charleston, WV 25311



John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173

FILED
2010 NOV 24 PM 3:48
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT