

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

REBECCA SHANKLIN,

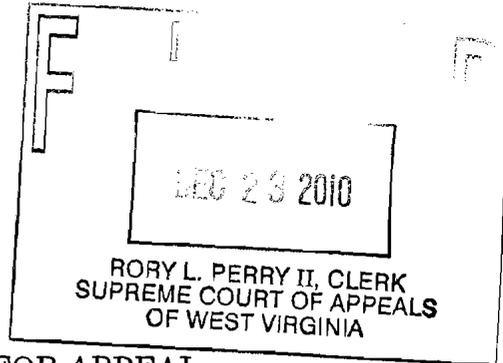
Petitioner,

v.

BOARD OF EDUCATION OF THE
COUNTY OF KANAWHA,

Respondent.

Appeal No. 101526
Civil Action No. 10-AA-25



RESPONSE TO PETITION FOR APPEAL

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Procedural Background

The petitioner has filed this appeal of an order of the Circuit Court of Kanawha County, West Virginia, which order affirmed a decision of the West Virginia Public Employees Grievance Board. The petitioner filed a grievance grieving the termination the petitioner's employment contract as a general maintenance service employee and returning her to a position as a cook. The ALJ found that even if respondent incorrectly determined not to include a multiclassified employee when it decided to reduce the number of general maintenance positions, the petitioner was not harmed by this decision, since she was not the most senior general maintenance employee whose contract was terminated.

The Circuit Court found the Grievance Board's decision was not clearly wrong because the petitioner would not have been retained as a general maintenance employee even if the respondent had properly conducted the reduction in force and the record below supports the conclusion that the petitioner failed to prove that the lack of need for general maintenance employees was erroneous. It is from this order that the petitioner has filed her appeal.

Facts

The Administrative Law Judge for the West Virginia Public Employees Grievance Board made the following findings of fact:

1. Prior to being RIF'd,¹ Grievant² was employed by the BOE as a General Maintenance service personnel. She had been employed in the General

¹ RIF stands for Reduction in Force.

² In the Level III decision, the petitioner is referred to as the "Grievant."

Maintenance classification since July of 2007. Prior to that time, she worked as a cook for approximately twenty years. While working as a cook, Grievant also worked during the summers doing general maintenance work. Grievant currently works as a cook for the BOE.

2. Karen Harper³ was employed as a General Maintenance service personnel from approximately July of 2007 until being RIF'd. Prior to that, she worked as a bus operator and custodian. Ms. Harper was recertified as a school bus operator and began driving a school bus for the Respondent in the Spring of 2009.

3. In the Spring of 2009, the Superintendent of Schools advised Terry Hollandsworth, Administrative Assistant for Maintenance, Custodial Services and Energy Management, that he should recommend the elimination of a number of positions within the maintenance department. After reviewing the departmental personnel, Mr. Hollandsworth recommended the elimination of one clerk position and four general maintenance positions. These positions were being RIF'd for financial reasons in an effort to stay within the State's school aid formula. The individuals who held such positions were notified of the recommendation to eliminate their positions.

4. By letter dated March 18, 2009, Respondent notified Grievant, Ms. Harper and two other women employed as General Maintenance service personnel that they would be reduced in force for the 2009-2010 school year.

5. Grievant and another General Maintenance employee, Brenda Isaacs,

³ Ms. Harper sought to intervene in Ms. Shanklin's grievance, which was denied. Ms. Harper appealed this decision, and the Court, by an order dated December 14, 2010,

requested a hearing before the BOE, which was held on March 26, 2009. After conducting a hearing, the BOE voted to eliminate the positions on March 26, 2009.

6. Ms. Brenda⁴ Isaacs had been employed in the General Maintenance classification for four years, or since approximately 2005. She had more seniority than Ms. Shanklin or Ms. Harper.

7. Respondent retained a multiclassified employee with the classification of Electrician II/General Maintenance for the 2009-2010 school year. This individual had less seniority than Grievant in the General Maintenance classification. This individual, Robert Keener, worked at Laidley Field.

8. Grievant is not a licensed electrician and the General Maintenance classification does not require an electrician license.

9. On or about April 14, 2009, Grievant filed a grievance at Level One. By written agreement of the parties, this grievance was waived to Level Three. Grievant filed an appeal to Level Three in accordance with that agreement on May 9, 2009.

10. Ms. Karen Harper made a request to intervene on May 12, 2009, after Grievant's appeal to Level Three. Ms. Harper did not file a grievance within fifteen days of being notified that her employment was terminated due to a reduction in force.

The Circuit Court made the following findings of fact which are generally in accord with the findings of the Administrative Law Judge.

affirmed the decision of the Grievance Board.

⁴ Ms. Issacs' first name is actually Barbara.

1. Ms. Shanklin is currently employed by the BOE (the respondent) as a cook. She has been so employed for approximately 20 years.

2. On July 1, 2007, Ms. Shanklin in addition to her position as a cook, was also hired as a full-time general maintenance employee at Crede. August 17, 2009 Hearing Transcript ("Hr. Tr."), p. 19.

3. During the 2008-2009 school year, the BOE employed four employees with contracts of employment in general maintenance classification.

4. By letter dated March 18, 2009, the BOE notified Ms. Shanklin, as well as the other three regular general maintenance employees, that in regards to their positions as full-time general maintenance employees, they would be reduced in force ("RIF'd") for the 2009-2010 school year. Hr. Tr., Respondent's Ex. 2. According to the testimony of Terry Hollandsworth, Administrative Assistant for Maintenance, Custodial Services and Energy Management, the positions were being RIF'd for financial reasons in an effort to stay within the State's school aid formula. Hr. Tr., p. 59. Specifically, the Maintenance, Custodial Services, and Energy Management Department had too many service personnel, meaning the BOE was employing more service personnel than the State was paying for. Id.

5. Ms. Shanklin and another general maintenance employee, Ms. Isaacs, requested a hearing before the BOE on the proposed reduction in force. On March 26, 2009, a hearing was held before the BOE on the proposed reduction in force. The BOE approved the reduction in force. The reduction in force eliminated all full-time positions with only the classification of general maintenance. Thus, Ms.

Shanklin lost her full-time position as a general maintenance employee. However, Ms. Shanklin's employment as a cook for the BOE was not affected by the reduction in force.

6. Ms. Isaacs had the most seniority in the general maintenance classification out of the four employees RIF'd. Petitioner's Brief, p. 2. However, Ms. Isaacs did not grieve her reduction in force and the time to do so has since elapsed.

7. Following the reduction in force, the BOE retained Donald Enis, a multi-classified employee with the classification of Electrician II/General Maintenance for the 2009-2010 school year. Mr. Enis had less seniority in the general maintenance classification than all of four employees RIF'd.⁵ (footnote by the Court) Mr. Enis worked at Laidley Field.

8. Prior to the Level III hearing below, Mr. Enis was replaced by another multi-classified employee, Robert Keener, who has a classification of Electrician II/General Maintenance.

9. Ms. Shanklin is not a licensed electrician and the General Maintenance classification does require an electrician license. "General maintenance" means a person employed as a helper to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system." W.Va. Code §18A-4-8(43).

⁵ In regards to seniority within a particular classification, multi-classified employees are not within a class by themselves, but instead accumulate seniority within each classification category within their respective multi-classification titles. Thus, a multi-classified employee is subject to a reduction in force in each individual job category on the basis of the respective seniority accumulated in each. W.Va. Code §18A-4-8g(1); Syl. pt. 5, Taylor-Hurley v. Mingo County Bd. of Educ., 209 W.Va. 780, 551 S.E.2d 702 (2001).

10. On April 14, 2009, Ms. Shanklin filed a grievance at Level I. By written agreement of the parties, this grievance was waived to Level III. Ms. Shanklin filed the Level III grievance in accordance with that agreement on May 9, 2009.⁶ (footnote by the Court)

11. Approximately four months after Ms. Shanklin filed her grievance and only three days prior to the Level III hearing below, by letter dated August 14, 2009, Mr. Keener agreed to the deletion of the General Maintenance classification from his contract. Hr. Tr., Respondent's Ex. 1. At the time of the hearing, the BOE had not yet approved the deletion.

12. On August 17, 2009, a Level III hearing was held by the [Grievance] Board before ALJ, Mark Barney.

13. By Decision entered on December 28, 2009, the Board denied Ms. Shanklin's grievance, finding and concluding that although Ms. Shanklin had shown that the BOE violated the law regarding the reduction in force, she was not harmed by the violation as she was not the most senior of the four general maintenance employees subject to the reduction. Thus, according to the Board, Ms. Shanklin would not have been entitled to the position anyway. Decision, p. 14. The Board also concluded that Ms. Shanklin failed to prove that the BOE's determination of lack of need for regular general maintenance employees was erroneous.

⁶ Karen Harper, one of the four employees RIF'd, filed a motion to intervene below and participated in the Level III hearing. However, the Board found that Ms. Harper did not timely grieve her reduction in force and did not timely file her motion to intervene below. Ms. Harper's appeal is pending before the Honorable James Stucky, in Civil Action No. 10-

Standard of Review

The Court reviews appeals from the West Virginia Public Employees Grievance Board under West Virginia Code §6C-2-5. This Code section provides, in part:

The decision of the administrative law judge shall be final upon the parties and shall be enforceable in the Circuit Court of Kanawha County.

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or lawfully adopted rule, regulation or written policy of the employer;
- (2) Exceeds the administrative judge's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

A decision of a hearing examiner for the West Virginia Education and State Employees Grievance Board, based upon findings of fact, should not be reversed unless it is clearly wrong. *Parham v. Raleigh County Board of Education*, 192 W. Va.540, 387 S. E. 2d 374 (1994); *Putnam County Board of Education v. Andrews*, 198 W. Va. 403, 481 S. E. 2d 498 (1996); and *Keatley v. Mercer County Board of Education*, 200 W. Va. 487, 490 S. E. 2d 306 (1997). The standard of review is narrow, and the Court is not to substitute its judgment for that of the hearing

examiner. *Martin v. Randolph County Board of Education*, 195 W. Va. 297, 465 S. E. 2d 399 (1995).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an administrative agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Webb v. West Virginia Bd. of Medicine, 2002, 569 S.E.2d 225, 212 W.Va. 149. In employing clearly wrong and arbitrary and capricious standards for review of agency decision, circuit court must evaluate record of agency's proceeding to determine whether there is evidence on record as a whole to support agency's decision. Code, 29A-5-4(g)(5, 6). Walker v. West Virginia Ethics Com'n, 1997, 492 S.E.2d 167, 201 W.Va. 108. Court reviewing an administrative agency decision is bound to evaluate the matter based upon the agency's findings of fact to determine whether there is evidence on the record as a whole to support the agency's decision, regardless of whether the court would have reached a different conclusion on the same set of facts. Plumley v. West Virginia Dept. of Health and Human Resources/Office of Health Facility Licensure and Certification, 2007, 655 S.E.2d 765.

Questions Presented

The petitioner has framed the issues in this manner:

- A. The Circuit Court and the Administrative Law Judge erred in holding the 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.

Discussion

In the case at hand, there is no factual dispute about what happened. The Superintendent of Schools recommended the elimination of certain service personnel positions, including four General Maintenance positions, and the Board voted to approve those reductions. The petitioner argues that the Circuit Court and Grievance Board decisions are incorrect for the reasons stated above. The respondent believes the decisions are correct and should not be disturbed by this Court.

Prior to June 30, 2009, the respondent employed five individuals with the classification title of general maintenance. Four of those individuals were classified solely as general maintenance and were employed at the respondent's Crede Warehouse. The other was classified as electrician/general maintenance and was assigned to work at Laidley Field. After June 30, 2009, only the individual assigned to Laidley Field was left in his prior position.⁷

Both the Grievance Board and the Circuit Court determined that the petitioner was not entitled to the relief she is seeking because, even if the

⁷ As noted above, the general maintenance classification has been deleted from this individual's classification.

respondent's decision was incorrect, only the most senior general maintenance employee would have benefited from correcting the error. More simply put, if there were five employees with general maintenance classification prior to the decision to eliminate the positions, and the respondent determined to eliminate four of those positions, then only the most senior general maintenance employee was entitled to be retained in the classification.⁸

There is nothing unlawful, arbitrary or capricious about the ALJ's decision. In effect the ALJ and the Circuit Court held that the petitioner did not have standing to pursue the grievance since she was not the most senior general maintenance employee.

For the foregoing reasons, the Court should affirm the decision of the Grievance Board denying the petitioner's grievance.

The petitioner further argues the reduction in force was not necessary because the petitioner's former job duties are being performed by other individuals. The petitioner plainly does not understand what happens in a reduction in force. Except in unusual circumstances, when an employee is laid off, the employee's job duties still need to be performed. In most instances those duties are absorbed by the remaining employees. The routine business of running a school system goes on, and the remaining employees are required do whatever it takes to get the job done. The school system must continue to operate, only with a fewer number of employees.

⁸ It is undisputed that Ms. Issacs is the most senior general maintenance employee.

What appears to be confusing the petitioner is that the respondent continues to call out substitutes to fill in when regular employees are absent. There is nothing unusual or inappropriate about doing that. When a regular employee is absent, the substitute call out system first tries to call a substitute in the given classification, i.e., plumber, electrician HVAC, etc. If there is no substitute in the absent employee's classification available, then the system begins calling general maintenance substitutes to fill in. The respondent does not employ general maintenance workers on permanent basis, but rather on a day to day basis when no other skilled craft substitute is available to fill in. Having general maintenance substitutes fill in for other employees who are off work for one reason or another or fill in until a vacancy is filled does not give the petitioner the right to have a permanent position as a general maintenance service personnel.

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-4-8b 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). The fact that there are individuals who are performing many of the same job duties the petitioner used to perform is not a sufficient basis upon which to conclude that the respondent is improperly utilizing the services of substitute employees.

Conclusion

Based on all of the foregoing, the respondent, Kanawha County Board of Education, respectfully requests that the Court determine that the decisions of the West Virginia Public Employees Grievance Board and the Circuit Court were clearly correct and refuse the petition for appeal filed by the petitioner herein.

Respectfully submitted
KANAWHA COUNTY BOARD
OF EDUCATION
By Counsel



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CERTIFICATE OF SERVICE

The undersigned, James W. Withrow, Counsel for the Board of Education of the County of Kanawha, hereby certifies that on the 22nd day of December, 2010, I served the foregoing RESPONSE TO PETITION FOR APPEAL by mailing a true and correct copy thereof, postage prepaid to the following individual:

John E. Roush
West Virginia School Service
Personnel Association
1610 Washington Street East
Charleston, WV 25311



James W. Withrow