IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

No. 21897

GWEN LUCION, ET AL.,

Petitioners Below, Appellees

v.

MCDOWELL COUNTY BOARD OF EDUCATION

Respondent Below, Appellant

Appeal from the Circuit Court of McDowell County

Honorable Kendrick King, Judge

Civil Action No. 90-AP-59

REVERSED

Submitted: January 19, 1994

Filed: February 17, 1994

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Attorney for the Appellees

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Welch, West Virginia

Attorney for the Appellant

The Opinion of the Court was delivered PER CURIAM.

JUSTICE McHUGH and JUSTICE MILLER dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "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." Syllabus Point 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

2. "When a county school board seeks to reduce the working hours of a service employee by one half, the board must comply with the procedures set out in W.

Va. Code, 18A-2-6 [1973]." Syllabus, Bd. of Educ. of County of Fayette v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982).

3. "A final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to W.Va.Code, 18-29-1, et seq. (1985), and based upon findings of fact, should not be reversed unless clearly wrong." Syllabus Point 1, Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989).

Per Curiam:

The McDowell County Board of Education (hereinafter the Board) appeals a decision of the Circuit Court of McDowell County holding that the Board should follow the reduction in force provisions of W. Va. Code 18A-4-8b [1990] in order to decrease service personnel employment costs. In April 1989, in an effort to reduce employment costs because of declining student enrollment, the Board terminated the employment contracts of 57 school service personnel, the appellees in this action, and issued the appellees new contracts for the 1989-90 school year with reduced employment terms and

[1]Although W. Va. Code 18A-4-8b was amended in 1990, the applicable provision was in effect when this case arose.

proportional decreases in salary. After their grievance was rejected by the West Virginia Education and School Employees Grievance Board, the circuit court, on appeal,

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[2]The appellees are: Judy Crabtree, Patsy Caceamo, Albert Sheets, John Adams, James Rasnake, Earl Muncy, Jerry Lockhart, David Rose, David Gates, James Lawson, Vernal Carrington, Thurman Martin, Jonnie H. Cook, Phyllis Rice, Donal Hastings, Thomas Parish, Grant Thompson, Tom Fanning, Harry Rushbrook, Tommy Brown, Charles White, Emory Zimmerman, Christopher Jennings, Rudolph Marshall, Antonio Mosko, Tevis Marshall, William Powell, Edwin Egleson, Ricky Blevins, Sammy Owens, Lewis Lambert, John Roark, Wayman Lambert, Donald Sizemore, Orban Porterfield, Danny Bridgeman, Edward Hughes, Neil McCall, Nick Parker, James Fowler, Terry Price, Claudette Egleson, Imogene Coleman, Robert Alley, Brenda Wright, Drema Dillon, Dreama Thorn, Shirley Dash, Helen Hunt, Lawrence Rose, Howard Rose, Fred Smith, Michael Fields, Timothy Barker, James Kelly, Glen Shoun and John Wilson.

Although the case is styled under Gwen Lucion's name, she and Shirley Hillyer acted as the appellees' representatives and were not adversely affected by the Board's actions. Ms. Lucion's status became clear after the start of the Level IV hearing before the West Virginia Education and State Employees Grievance Board and no change in the case style was deemed necessary.

found for the appellees. Given the circumstances of this case, we find that the Board complied with the termination procedures set out in W. Va. Code 18A-2-6 [1989], and reverse the decision of the circuit court.

In April 1989, the appellees received notice that Superintendent Kenneth Roberts would recommend the termination of their employment contracts. The terminations were designed to reduce employment costs because of an expected decline in 1989-90 school year operating funds caused by decreased student enrollment. The appellees are service personnel whose contract employment terms for the 1988-89 school year exceeded 200 days. At the appellees' request, the Board held a hearing of April

[3]Although at the Board's hearing, the appellees' lawyer alleged that the Board

18, 1989. After the hearing, the Board voted to terminate the appellees' contracts and to "reinstate" the appellees to identical contracts except with reduced employment terms.

Most of the appellees' employment terms were reduced from 261 days to 240 days with a proportional decrease in salary.

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failed to consider seniority when it terminated the contracts, the hearing's record does not indicate the seniority of the appellees or the seniority of the service personnel whose contracts were not terminated. Apparently except for the chief bus operator whose job was posted because he was retiring, the contracts of all service personnel with 261-day employment terms were terminated.

[4]The following are exceptions to the general pattern: the 246-day employment term of Tom Fanning was reduced to 240 days; and, the 261-day employment terms of John Roark, William Powell and Shirley Dash were reduced to 200 days.

In addition, although the petition to circuit court alleges that the employment terms of Elizabeth Handy and Jimmy Hart (or Jimmy Hunt) were reduced, neither is listed as a petitioner/appellee. The record of the Board's April 18, 1989

Alleging that the Board acted improperly in reducing their employment terms, the appellees filed a grievance. After their grievance was waived at Levels I, II and III, a Level IV hearing was held before the West Virginia Education and State Employees Grievance Board. Based on Bd. of Educ. of the County of Fayette v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982), the Level IV hearing examiner found that the Board had followed statutory requirements to terminate the appellees' contracts and rejected the appellees' argument that the Code requires the Board to follow the

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hearing indicates that Ms. Handy was present as a petitioner and that her employment term was reduced from 220 days to 200 days. The record also indicates that Jimmy Hart (or Jimmy Hunt)'s name was removed from the list of petitioners because his employment term was not reduced.

No information on the seniority of these service personnel was presented.

reduction in force provisions of W. Va. Code 18A-4-8b [1990]. On appeal, the circuit court distinguished Hunley as a "procedural rights" decision that statutory changes had rendered inapplicable, and found that the Board's only option to reduce employment costs of service personnel was to eliminate positions. The circuit court reinstated the appellees' 1988-89 contracts with full compensation and other benefits. The Board then appealed to this Court.

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[5]Although the appellees at the Level IV hearing asserted that if their positions were terminated, the Board, pursuant to W. Va. Code 18A-4-8b(b) [1990], should have posted the vacant positions, the appellees did not request position posting because of the number of positions involved.

[6]On appeal, the Board alleges that because the circuit judge's wife was employed by the Board, he should have recused himself. Apparently, the circuit judge informed the parties of his previous representations, and according to the appellees' brief, also informed the parties of his wife's employment. In any case, the judge's wife was not

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The central question in this case concerns the options available to a board of education to cut costs arising from the employment of service personnel. The appellees maintain that because of their continuing employment contacts (W. Va. Code 18A-2-6 [1989]) and the non-relegation clause (W. Va. Code 18A-4-8 [1990]), the Board's only option when seeking to decrease service personnel employment costs is to follow the reduction in force provisions of W. Va. Code 18A-4-8b [1990]. Although we

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employed by the Board as a service employee; the Board should have known who it employs; and, if necessary, the the Board should have accepted the circuit judge's offer of recusal.

acknowledge that the legislature has given substantial protection to service personnel, this protection does not require the Board to eliminate jobs rather than modifying the employment terms of the existing jobs.

This Court consistently has acknowledged that "[c]ounty 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." Syllabus Point 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 445, 425 S.E.2d 111, 121 (1992); Bd. of Educ. of County of Wood v.

Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992); Syl. Pt. 3, Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

A 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 [1993] are met. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms.

At both the Board's hearing and the Level IV hearing, the appellees claimed that the Board acted in an arbitrary and capricious manner in reducing their employment terms because the reduced terms would result in unmet school needs and substantial overtime that would annihilate any net savings. Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education. Although W. Va. Code 18A-4-8 [1993] requires a minimum employment term of "ten months" for service personnel, this Code section also states that a "board of education may contract with all or part of these personnel for a longer term. (Emphasis added.)"

If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code 18A-4-8b [1990]. If a board of education decides to reduce the employment terms for particular jobs, the board must first terminate the existing contracts by following the

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[7]W. Va. Code 18A-4-8b [1990] states, in pertinent part:

> 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 of that 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.

procedures of W. Va. Code 18A-2-6 [1989], and second fill the job vacancies by following the procedures and requirements of W. Va. Code 18A-4-8b [1990]. In either case, a

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[8]W. Va. Code 18A-2-6 [1989] states, in pertinent part:

> The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year. . . except that for the school year one thousand nine hundred eighty-eight--eight-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. (Emphasis added.)

[9]W. Va. Code 18A-4-8b [1990] states, in pertinent part:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service

board of education must "make decisions affecting promotion and filling of any service personnel positions of employment or jobs. . . on the basis of seniority, qualifications and evaluation of past service." W. Va. Code 18A-4-8b [1990].

> personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
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> . . .
>
> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. . . .

See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988) (posting required to fill classroom teacher vacancy).

In Bd. of Educ. of County of Fayette v. Hunley, supra, we stated that the procedures of W. Va. Code 18A-2-6 [1973] should have been followed when the working hours of three service employees were cut in half. Although the board of education in Hunley characterized their action as a transfer, we found that they "terminate[d] the contracts with the secretaries and supplant[ed] the old contracts with new half-time contracts." Hunley, 169 W. Va. at 492, 288 S.E.2d at 525. In the Syllabus of Hunley, we stated:

> When a county school board seeks to reduce the working hours of a service employee by one half, the board must comply with the procedures set out in W. Va. Code, 18A-2-6 [1973].

The appellees argue that Hunley is no longer applicable because of statutory changes. In support of their argument, the appellees cited their continuing contract (W. Va. Code 18A-2-6 [1989]), their non-relegation clause (W. Va. Code 18A-4-8 [1988]) and the reduction in force provisions (W. Va. Code 18A-4-8b [1990]). However, none of these Code sections invalidates Hunley. Hunley cites the continuing contract provisions of W. Va. Code 18A-2-6 [1973]. Hunley, 169 W. Va. at 491 n.1, 288 S.E.2d at 525 n.1. Although the Code section containing the continuing contract was amended in 1981, 1984 and 1989, the amendments did not modify the basic substantive rights of a continuing contract.

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[10]Compare the 1973 version of W. Va. Code 18A-2-6, which is underlined, with the pertinent parts of the same 1989 Code section:

After three years of acceptable employment, each ~~auxiliary and~~ service

personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: Provided, That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as

modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date, except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment. . . .

The 1981 amendment deleted "auxiliary" personnel from coverage and made other minor changes.

The non-relegation clause of W. Va. Code 18A-4-8 [1988] states:

> No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years.

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[11]A review of the history of the non-relegation clause negates the appellees' argument that Hunley is no longer applicable because of statutory changes. The basic non-relegation clause was added to W. Va. Code 18A-4-8 in 1977 with the underlined sections added in 1982. (In 1981, auxiliary personnel were deleted from coverage under this section.)

> No service employee, without his written consent, shall be reclassified by class title nor may a service employee, without his written consent be relegated to any condition of employment which would result in a reduction of his salary earned during the current fiscal year or which would result in a

Although the non-relegation clause states that a service employee may not be adversely affected economically either during a current fiscal year or in subsequent years, provided that the service employee remains "in the same job position and classification," the appellees did not continue "in the same job position." Rather, the appellees' former jobs with extended employment terms were terminated, and their new jobs had reduced employment terms. We find that because of the changes in the appellees' positions, the non-relegation clause of W. Va. Code 18A-4-8 [1988] does not apply.

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reduction of his salary for which he would qualify by continuing in the same job position

and classification held during said fiscal year and subsequent years.

Finally, W. Va. Code 18A-4-8b [1990] is applicable only after a board of education "[s]hould . . . be required to reduce the number of employees within a particular job classification. . . ." See supra note 4 for a more complete text.

In this case, although the Board followed the contract termination procedures of W. Va. Code 18A-2-6 [1989], it should not have to "reinstate" the appellees to the same jobs with reduced employment terms because this "reinstatement" did not ensure that the new positions would be filled "on the basis of seniority, qualifications and evaluation of past service." W. Va. Code 18A-4-8b [1990]. However, at the Level

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[12]In this case, the appellees did not raise any allegations concerning seniority of the service personnel whose contracts were terminated. See supra note 3.

IV hearing, the appellees abandoned their request to have the new jobs posted. See supra note 5.

II

In Syllabus Point 1, Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989), we stated:

> A final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to W.Va.Code, 18-29-1, et seq. (1985), and based upon findings of fact, should not be reversed unless clearly wrong.

In accord Pockl v. Ohio County Bd. of Ed., supra, 185 W. Va. at 259-60, 406 S.E.2d at 690-91. Based on Hunley, we find that the Level IV hearing examiner correctly dismissed the appellees' grievance because the Board complied with the termination procedures of W. Va. Code 18A-2-6 [1989].

In this case, the Board's decision that the schools needed more service employees during the school year and fewer service employees during the summer and other nonschool days, is reasonable. Firing some of the service employees would have reduced the service personnel employment costs but at the expense of the ability to meet immediately the needs during the school year. From the humanitarian prospective, the

firing of people in economic hard times, rather than reducing everyone's hours defeats government's implied goal of helping to provide counter cyclical employment.

For the above stated reasons, the judgment of the Circuit Court of McDowell County is reversed and the decision of the West Virginia Education and State Employees Grievance Board is reinstated.

Reversed.