

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

REBECCA SHANKLIN,
Petitioner,

v.

Civil Action No. 10-AA-25
Judge Louis H. Bloom

KANAWHA COUNTY
BOARD OF EDUCATION,
Respondent.

2010 JUL 28 PM 4:37
CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED

FINAL ORDER

On June 24, 2010, came the petitioner, Rebecca Shanklin ("Ms. Shanklin"), by counsel, John E. Roush, and the respondent, the Kanawha County Board of Education ("BOE"), by counsel, James W. Withrow, for a hearing on Ms. Shanklin's "Petition for Appeal" filed on January 28, 2010. Ms. Shanklin appeals from the "Decision" of the West Virginia Public Employees Grievance Board ("Board") entered on December 28, 2009, finding and concluding that although the BOE failed to properly conduct the reduction in force of Ms. Shanklin, pursuant to W.Va. Code § 18A-4-8g, Ms. Shanklin is still not entitled to a general maintenance position because she failed to establish that she was the most senior general maintenance employee reduced in force.

Upon review of the Petition for Appeal, the underlying administrative record, the parties' legal memoranda filed herein, and the applicable law, the Court is of the opinion that the Decision of the Board must be affirmed for the reasons set forth more fully below.

FINDINGS OF FACT

1. Ms. Shanklin is currently employed by the BOE 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.¹ 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).

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, 2009.²

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 Board before ALJ, Mark Barney.

¹ 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).

² 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-AA-24.

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.

STANDARD OF REVIEW

1. Review of the Decision of the Grievance Board is governed by W.Va. Code § 6C-2-5(b), which provides the grounds upon which a decision may be reviewed for error. Specifically, W.Va. Code § 6C-2-5(b) states as follows:

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

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law 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 abuse of discretion or clearly unwarranted exercise of discretion.

More particularly, review of grievance rulings involves a combination of deferential and plenary review. A reviewing court is obligated to give deference to factual findings rendered by the Grievance Board, while conclusions of law and application of law to the facts are reviewed de novo. Syl. pt. 1, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177,

539 S.E.2d 437 (2000).³ Further, the “clearly wrong” and “arbitrary and capricious” standards of review are deferential ones, which presume that 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 Board of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002).

2. With these standards in mind, the Court must determine whether the Decision of the Grievance Board was (1) contrary to law, or (2) clearly wrong in view of the reliable, probative and substantial evidence on the whole record, as asserted by Ms. Shanklin.

DISCUSSION

1. Ms. Shanklin argues that the failure of the BOE to follow the proper statutory procedures for the reduction in force constituted a separate violation for each of the four general maintenance employees RIF’d. Therefore, each employee, including Ms. Shanklin, is entitled to reinstatement. Also, Ms. Shanklin argues that the Board erred in finding that she was not entitled to reinstatement because she was not the most senior employee RIF’d, because the most senior employee, Ms. Isaacs, did not file a grievance and the time to do so has expired. Further, the Board did not order Ms. Isaacs reinstated. Thus, according to the Petitioner she is being denied relief just because Ms. Isaacs exists.

2. The Petitioner also argues that the Board erred in finding that she failed to prove that the BOE’s determination of a lack of need for regular general maintenance employees was erroneous. Under W.Va. Code §18A-4-8b(j), a reduction in force is permitted based on a lack of need for the services of employees within a particular classification. The Petitioner argues that the BOE intended to use substitutes to perform the work of the four general maintenance employees terminated, and thus, there was not a lack of need for her position. Petitioner’s Brief, p. 9. Under W.Va. Code § 18A-4-15, substitutes are not permitted to

³ *Cahill* refers to the appeal provision of W.Va. Code § 18-29-7, which was recodified effective July 1, 2007, without substantive change at W.Va. Code § 6C-2-5. Accordingly, case law interpreting the old provision is applicable herein.

replace regular employees permanently. However, based on the testimony of Terry Hollandsworth, a representative of the BOE, regarding the substitute call system, this argument is flawed.

3. Mr. Hollandsworth testified that the TSSI system (substitute call-out system) first starts by calling substitutes within the particular specialty classification for which a substitute is needed, i.e., if an automotive mechanic calls off sick, then the system starts by calling all automotive mechanics on the substitutes list. Hr. Tr., p. 61. Only when a substitute within the specific specialty classification cannot be found is when the TSSI system starts calling general maintenance substitutes. Hr. Tr. p. 61-62. Thus, the Board concluded that the BOE is not using general maintenance substitutes to replace the four general maintenance positions it terminated, but to fill-in when a substitute within one of the skilled positions is unavailable. This conclusion by the Board is supported by the evidence on the whole record, specifically the testimony of Mr. Hollandsworth regarding how the substitute call out system operates.

4. Obviously the BOE agrees with the Board's ultimate Decision of denying the Petitioner's grievance on the ground that she did not prove she was the most senior employee RIF'd and thus, is not entitled to be reinstated as a general maintenance employee at Laidley Field, or in any other position. To the BOE, the Board in effect held that the petitioner did not have standing to pursue the grievance since she was not the most senior general maintenance employee, i.e. even if the BOE did follow the proper procedures for the reduction in force, Ms. Isaac not Ms. Shanklin would have been retained.

5. There is no question that the BOE violated W.Va. Code §§18A-4-8g(e) and (l), by allowing a less senior general maintenance employee to remain when implementing a reduction in force of all regular general maintenance positions. Further, the BOE did not make a timely effort to comply with W.Va. Code §18A-4-8g(l), by deleting the general maintenance classification, the subject of the reduction in force, from the multi-classified

employee who was retained at Laidley Field. Thus, the main issue is whether the Board erred in finding and concluding that Ms. Shanklin was not entitled to re-instatement because she was not the most senior employee RIF'd, and thus, even if the BOE had followed the proper procedure she would not have been retained. The Court is of the opinion that the Board's Decision on this point is not contrary to the law or clearly wrong in view of the evidence on the whole record.

CONCLUSIONS OF LAW

Based on the foregoing, the Court concludes that the Board's Decision is not clearly wrong, because as stated by the Board even if the BOE had properly conducted the reduction in force, Ms. Shanklin, would not have been retained in the general maintenance position because she was not the most senior general maintenance RIF'd. Furthermore, the Court concludes that the record below supports the Board's conclusion that Ms. Shanklin failed to prove that the BOE's determination of a lack of need for regular general maintenance employees was erroneous. Therefore, the Court concludes that the Board's Decision is not contrary to law or clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

DECISION

Accordingly, the Court does hereby **ORDER** that Ms. Shanklin's Petition for Appeal is **DENIED** and that the Board's Decision is **AFFIRMED**. The Court further **ORDERS** that the above-styled action be **DISMISSED** and **STRICKEN** from the docket of this Court. The objections of any party aggrieved by this Order are noted and preserved.

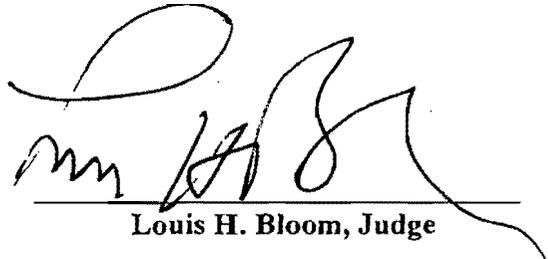
The Clerk is **DIRECTED** to send a certified copy of this Order to counsel of record

for the parties at the following addresses:

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ENTERED this 28 day of July, 2010.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF July, 2010.
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 7/29/10
Certified copy sent to:
 counsel of record JK, JW, Eric Brand
 party
 other
(please indicate)
By: certified/registered mail
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 hand delivery
 internet/e-mail
Other direction accomplished
L. Allen
Deputy Circuit Clerk