ROBERT POMPHREY,

Grievant,

v. DOCKET NO. 94-31-183

MONROE COUNTY BOARD OF EDUCATION,

Respondent,

and

PEGGY WILSON,

Intervenor.

D E C I S I O N

Grievant Robert Pomphrey, employed as a classroom teacher by the Monroe County Board of Education, filed a level four grievance on May 9, 1994, alleging as follows:

> CODE 18A-4-7a AND 18A-4-8f
>
> Grievant applied for position at Union Elem., the position was filled by a teacher from Greenville Elem. who used her preference initially for a position at Peterstown Elem. Grievant was qualified for this position. He believes that preference should only be considered for one position.

Pursuant to W. Va. Code § 18-29-3(u), Peggy Wilson, the teacher who received the position at Union Elementary, intervened on June 1, 1994. The parties requested a decision be made on the record developed below and submitted proposed findings of fact andconclusions of law on or about June 16, 1994. For the reasons stated below, the undersigned finds that Grievant cannot prevail.

The Monroe County School system proposed to close the Peterstown High School and the Greenville Elementary/Junior High School after the 1993-1994 school year. Students from those

schools would be consolidated and/or merged into a new high school and already existing elementary schools. W. Va. Code § 18A-4-8f provides that in the event of consolidation or merger, the board may, if a majority of the classroom teachers approve, give priority to classroom teachers in any of the schools to be closed when filling positions in the new school or filling new positions in existing schools as a result of consolidation or merger.

Pursuant to that statute, the Superintendent prepared a ballot for the faculty which explained in detail where each affected teacher could exercise his or her priority, depending on where his or her students would be enrolled for the 1994-1995 school year. Respondent's Exhibit 1. The teachers voted on March 12, 1993 to give priority to those teachers affected by the consolidation. Code Section 18A-4-8f provides that priority is determined according to seniority, and

> that the most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and so on until all the newly created positions are filled, or until all the teachers in the closed school or schools who wish to transfer into the newly created positions are placed: . . .

The Superintendent had advised the faculty that, because the Board would not know how many and which jobs would become available as a result of the consolidation, each individual affected by theconsolidation could apply for the first available job with the assurance that until all postings were complete, their priority status was preserved. The Board began posting new jobs as they became available.

Grievant is the most senior teacher in the Monroe County School system with 21 years seniority; however, his position was not affected by the consolidation. Teresa Johnson was the next most senior teacher with 20 years. Her position was affected by the consolidation, and she was first on the priority list for new positions. Peggy Wilson, the intervenor, was next with 19 years seniority, and her position was also affected by the consolidation. Ms. Wilson followed Ms. Johnson on the priority list. Respondent's Amended Exhibit 3.

On January 3, 1993, an English teacher position was posted for Peterstown Middle School. Ms. Wilson applied for and was awarded that position due to her position on the priority list. (Apparently Ms. Johnson did not apply for that position). Ms. Wilson informed the Board at that time that she was really interested in teaching elementary school, but since no elementary positions were posted at that time, she accepted the middle school job.

On February 16, 1993, positions for third and fourth grade teachers at Union Elementary School were posted as a result of the consolidation. Twelve teachers applied for these positions, including Grievant, Ms. Johnson and Ms. Wilson. Of the twelve, six applicants had priority and six did not. Ms. Johnson, being mostsenior on the priority list, chose the third grade position. Ms. Wilson was awarded the fourth grade position based on her priority status.

Grievant charges that the Board violated W. Va. Code §§ 18A-4-8f and 18A-4-7a in allowing Ms. Wilson to exercise her preference for the fourth grade position, because she had already used up her preference when she accepted the middle school position. He initially believed that he should have been awarded the fourth grade position due to his seniority. However, during the Level II hearing, it was pointed out to Grievant that he would not have received the position, as at least six other teachers with priority had also applied for the position who had not yet been placed. The next most senior teacher with priority would have been awarded the position if Ms. Wilson was found not eligible. Grievant conceded that he could not have received the fourth grade position because he did not possess priority, and his grievance was denied at Level II. Grievant now asks the Board at Level IV to determine how many times a teacher is permitted to exercise his or her priority under W. Va. Code § 18A-4-8f.

Given that he would not be entitled to the position currently held by Ms. Wilson even if she were holding it improperly, Grievant has no standing to pursue this grievance because, even if the Board did misapply the priority statute, he was not harmed. It is possible that somewhere down the line Grievant could be affected by the Board's application of the statute, but that is entirely speculative at this point. Grievant's employment rights have notbeen adversely affected by Ms. Wilson's receipt of the elementary school teaching position, and therefore, Grievant's complaint does not constitute a matter cognizable under W. Va. Code § 18-29-1, et seq., the grievance statute. See Shobe v. Latimer, 253 S.E.2d 54 (W. Va. 1979); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

This Board will not anticipate issues not fairly raised in the evidence. Richmond v. Raleigh County Bd. of Educ., Docket No. 41-86-127-1 (June 9, 1986). Both Grievant and Respondent ask this Board for just such an opinion in their respective proposed findings of fact and conclusions of law.

In addition to the foregoing narrative, the following findings of fact and conclusions of law are made.

Findings of Fact

1. The Monroe County School system proposed two school closures and consequent consolidations for the 1994-1995 school year.

2. Grievant is the most senior teacher in the Monroe County School system. Grievant's position was not affected by the proposed consolidation.

3. Intervenor Peggy Wilson's position was affected by the consolidation and she was given priority in selecting a new position by vote of the majority of teachers in the school system.

4. Intervenor exercised her priority in applying for and receiving a middle school teaching position.

5. An elementary school teaching position became available as a result of the consolidation. Twelve teachers applied for the position, including Grievant and Intervenor. Intervenor was allowed to exercise her priority again and was awarded the position.

6. Grievant would not have been eligible to receive the position even if Intervenor was not allowed to exercise her priority again. Other teachers with priority still had not been assigned positions and would have been eligible for the position.

Conclusions of Law

1. The relief requested is in the form of an advisory opinion with respect to the number of times a teacher can exercise his or her priority under W. Va. Code § 18A-4-8f. This Board will not issue advisory opinions or anticipate issues not fairly raised in the evidence. Richmond v. Raleigh County Bd. of Educ., Docket No. 41-86-127-1 (June 9, 1986).

2. Grievant has not been harmed by Respondent's application of W. Va. Code § 18A-4-8f and has no standing to bring this grievance before this Board.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe 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 intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Dated: July 1, 1994