RICHARD W. BARBER

v. Docket No. 94-33-405

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Richard Barber, is employed by the McDowell County Board of Education (Board) as a classroom teacher at Mount View High School (MVHS). He filed this grievance at Level I May 19, 1994, protesting his non-selection for the position of Governor's Summer Youth Program Coordinator. His supervisor was without authority to grant relief and the grievance was denied following a hearing held July 7, 1994. (See footnote 1) The Board, at Level III,declined to address the matter and appeal to Level IV was made August 10, 1994. A hearing was held September 28, 1994, and, although the parties were given until October 12, 1994 to submit proposed findings of fact and conclusions of law, none were received.

There is no dispute over the facts of the case. On April 25, 1994, the Board posted the job in issue with a "West Virginia Certification in Teaching" as the only specified "Qualification." Under the heading "Work Period" the posting provided, "May 9, 1994 thru August 5, 1994 (390 HOURS OF EMPLOYMENT)." The grievant, who had worked in the Governor's Summer Youth Program in previous summers, made an application for the post despite that his teaching duties at MVHS for the 1993-94 school year at MVHS would occupy him until at least June 10, 1994. Barbara England, a substitute teacher, and Millie Robbins, another regularly-employed teacher, were the only other applicants.

Superintendent of Schools J. Kenneth Roberts reviewed the applications and concluded that because of their teaching duties, the grievant and Ms. Robbins could not perform the duties of the position during the first month of the employment term. Ms. England, who, by virtue of her substitute status, was available, was ultimately awarded the job.

The grievant complains that the Board should have made arrangements to accommodate his teaching schedule so that he could have performed the duties of the position. He suggests that if the Board had used other teachers to cover his classes; permitted himto occasionally leave MVHS early;

permitted him to take compensatory and annual leave; and/or allowed him to perform at least some of the duties by telephone and at times other than the regular work day, he would have been the most qualified candidate for the post. It is not an exaggeration to say that the grievant believes the Board should have gone to considerable lengths to procure the benefits of his prior Governor's Summer Youth Program experience. The Board asserts, at least in essence, that the complaint is frivolous and the undersigned agrees.

The unrefuted evidence of record is that Superintendent Roberts concluded quite logically that the Coordinator had to begin by May 9, 1994, at the latest; that the grievant and Ms. Robbins could not do so; that it would have been disruptive, to say the very least, to have their year end teaching schedules disrupted; that neither was prepared to surrender their teaching contracts; and that Ms. England was the only logical choice for the post. The undersigned is at a loss to understand the grievant's assertion that Superintendent Roberts acted "arbitrarily."

Whether the position in issue was a classroom teaching position or fell into the category of "professional personnel other than classroom teachers", W.Va. Code §18A-4-7a required that the applicants therefor meet the minimum requirements for the position listed in the posting. (See footnote 2) Here, the posting for the position wasclear in its pronouncement that the employment term would begin on May 9 and the undersigned concludes that availability on that date was thereby made a requirement for consideration. Since the grievant was not available on that date, he has failed to show any violation of the statute. He has otherwise failed to show that any aspect of the process by which the position was filled was violative of any policy, regulation, or theory of law.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell 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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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: April 21, 1995

Footnote: 1Barbara England, the successful applicant for the position in issue, was allowed to intervene at this hearing per W.Va. Code §18-29-3(u) which provides, "Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties."

This intervention did not become apparent to the undersigned until the Level IV hearing on September 28, 1994. Ms. England was subpoenaed as a witness for the grievant at the hearing but did not appear. Counsel agreed with the undersigned that since the employment term of the position had ended on August 5, 1994, Ms. England had no further interests to protect. Further, she was given at least constructive notice via the subpoena that the matter was appealed to Level IV and her failure to appear may be considered a waiver of any rights she may have had to continue the intervention.

Footnote: 2The grievant asserts that the position in question was a classroom teacher position within the meaning of Code §18A-4-7a and the Board maintains it was administrative in nature. Because of the above holdings, it is not necessary to resolve this dispute.

Further, the parties appear to agree that even though the Governor's Office exercises some control over the manner in which the youth program is operated on the local level, the funding for the position in issue is accomplished in such a manner that the county board is considered the employer and that the position falls within the purview of Code §18A-4-7a. There is little if any evidence on which the undersigned could reach this conclusion independently. In any event, it is accepted, for at least the purposes of argument, that the parties are correct.