MARY WHITT,

Grievant,

v. **DOCKET NO. 97-29-419**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and,

BRENDA DILLON,

Intervenor.

DECISION

This grievance was filed by Grievant Mary Whitt, a substitute teacher's aide, against Respondent Mingo County Board of Education ("MBOE"), alleging she should have been selected for the posted position of Autism Mentor/Aide (See footnote 1) at Varney Grade School. Grievant stated the position had been awarded to Intervenor Brenda Dillon, a regularly employed teacher's aide, that Ms. Dillon had not applied for the position, and that Ms. Dillon had not completed training as an Autism Mentor at the time of the posting. Grievant alleges a violation of W. Va. Code §§ 18A-4-8b and 18A-4-8g. As relief she seeks instatement into the position, back pay with interest to August 26,1997, seniority, and all other benefits to which she would have been entitled had she been placed in the position. (See footnote 2)

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 3)

Findings of Fact

1. Grievant has been employed eight years by MBOE as a substitute aide.

2. Brenda Dillon has been employed as a regular employee by MBOE 25 years, and has been an aide 19 years. Ms. Dillon was placed on transfer at the end of the 1996-97 school year.

3. On May 2, 1997, MBOE posted three Autism Mentor/Aide positions, and one of those was at

Varney Grade School. The deadline for applications was May 9, 1997. The posting required participation in the Autism Mentorship Program through Marshall University.

4. Grievant, Bonnie May and Marjorie Conley timely applied for the posted positions, as did other MBOE employees. Ms. May and Ms. Conley had participated in the Autism Mentorship Program through Marshall University, and were selected in July 1997 for two of the positions. Of the other applicants, only Grievant had participated in the Autism Mentorship Program through Marshall University. She successfully completed the Autism Mentor Training Workshop Part 1, atMarshall University in December 1996, and successfully completed "Mentor II" training in April 1997. She has approximately five months' experience working with autistic children.

5. Ms. Dillon did not apply for any of the posted positions.

6. The posted position of Autism Mentor/Aide at Varney Grade School was not filled within twenty days of the posting, and was never reposted.

7. Ms. Dillon was called by MBOE and offered one of three positions. One of the positions offered was the Autism Mentor/Aide position at Varney Grade School, which she chose. She was placed in that position on August 26, 1997. She had not participated in the Autism Mentorship Program until the summer of 1997, and had just successfully completed the Autism Mentor Training Workshop Part 1, at Marshall University on August 21, 1997. She had not completed the "Mentor II" training. She has worked with children with learning disabilities approximately three years. Some of this experience has been with autistic children.

Discussion

Grievant bears the burden of proving the allegations of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant argued first, that Ms. Dillon could not be selected for the posted vacancy because she was not an applicant, relying on Webster County Bd. of Educ. v. Johns, 191 W. Va. 664 (1994). (See footnote 4) Grievant further argued the posted position at issue had to be filled within 20 days of the posting, and could not be held open until Ms. Dillon completed the training required by the position.

Our Supreme Court of Appeals has held, quite clearly, that an employee who has not applied for a posted position cannot be selected for the position over a qualified applicant.

> Given that the terms "applicant" and "apply" appear to be an integral part of West Virginia Code § 18A-4-8b (1988), a board of education clearly exceeds its discretion in

> assigning an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when another individual, holding the necessary qualifications and superior seniority, applied for the position.

Syllabus Point 2, Webster, supra. Ms. Dillon did not apply for the position, and quite simply, could not have been selected over Grievant. (See footnote 5)

Grievant would prevail in this matter solely on her second argument, and it should be addressed in the determination of whether Grievant should have been placed in the position. Before addressing this, however, a procedural matter must be decided. Grievant filed a grievance in July or August, 1997, prior to the position being filled, arguing the posted position of Autism Mentor/Aide at Varney Grade School had to be filled within twenty days of the posting. Her grievance was denied at Level II on August 14, 1997, and she did not appeal that decision. The undersigned must determine whether this previous grievance precludes Grievant from raising theargument here that the position had to be filled within 20 days of the posting and could not be held open until Ms. Dillon completed the required training.

The first grievance clearly was based upon the argument that the position had to be filled within 20 days. A decision was rendered in that grievance at Level II. "One cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995)." Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997).

However, neither Respondent nor Intervenor raised this issue or otherwise challenged Grievant's right to pursue this grievance. The August 14, 1997 Level II Decision rendered in the prior grievance states:

> it may well be that grievant is pre-mature in filing this grievance. If respondent does subsequently choose a third party for the Varney Grade position, this grievant then has the right to file a grievance (or move to intervene in a pending grievance) to prove that she should have been chosen for the position in question. At that time the issue should be joined between -or among- the candidates for the position, with a final resolution.

Grievant's Exhibit 3 at Level II. Grievant offered no explanation for her failure to pursue this grievance to the next level. However, given that no party objected to Grievant essentially refiling her grievance after she was not selected, the language of the August 14, 1997 Level II Decision could be read to specifically allow this, and the new grievance was filed less than a month after the issuance of the Level II Decision, the undersigned will not dismiss this grievance and will allow Grievant to pursue the

argument that the position had to be filled within 20 working days of the posting date.

W. Va. Code § 18A-4-8b ¶ 7 provides:

> 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. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

The first paragraph of that Code Section provides that:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

MBOE could expand the qualifications for the posted position to require Autism Mentor training, so long as that expansion was consistent with the statutory definition of Autism Mentor. Snell v. Mingo County Bd. of Educ., Docket No. 97-29-154 (Aug. 13, 1997). The parties did not dispute that the Autism Mentor training requirement was consistent with the definition of Autism Mentor found in W. Va. Code § 18A-4-8.

Grievant met her burden of proving the position was posted and she was the only qualified applicant at the time the position was to be filled. Respondent presented no evidence or argument that the posting was withdrawn, or that the posting otherwise was unnecessary, to rebut Grievant's evidence. The language of Code § 18A-4-8b is mandatory. The posted position had to be filled within 20 working days of the date of the posting if a qualified applicant was available. The applicant had to be qualified at the time the statute required the position be filled; that is, within 20 working days of the posting. Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993). Ms. Dillonwas not qualified for the position at the time the position had to be filled, because she had not participated in the Autism Mentor training, and the position could not be held for her until she participated in the training. Id.

Respondent and Intervenor argued only that the State Board of Education mandated that no positions be filled until the 1997-98 school year began, and the position had been filled with the right person. Respondent's Level II Decision sheds no light on Respondent's position, stating essentially only that Grievant had not met her burden of proof, and that Respondent followed the letter and spirit

of W. Va. Code § 18A-4-8b. While the undersigned is sympathetic to MBOE's financial woes, no weight can be given to its argument regarding the State Board of Education directive, as no evidence was presented to support the argument. (See footnote 6) The undersigned would need testimonial or documentary evidence of the exact language of the mandate, who issued it and under what authority, and the effective date. The unrebutted evidence presented by Grievant was that two of the three Autism Mentor/Aide positions which had been posted were in fact filled in July 1997. If the mandate did not prevent MBOE from filling these positions, why would it prevent it from filling the Varney Grade School position by June 2, 1997? Even such a hiring freeze, if valid, would not necessarily allow Respondent to look beyond June 2, 1997 (20 working days after the date of the posting), in determining which applicants held the required qualifications, but this issue need not be addressed. Grievant did not identify how she believed Respondent had violated W. Va. Code § 18A-4- 8g. That Code Section deals with seniority of school service personnel. Given that there is no question that Ms. Dillon is far more senior than Grievant, the undersigned cannot determine what Grievant's argument might be, and finds no violation of this Code Section.

Grievant requested on her grievance form that relief be granted retroactive to August 26, 1997, and she stated at the Level II hearing that she would be satisfied with relief retroactive to the beginning of the 1997-98 school year. In her post-hearing submission, however, she asked that she be awarded relief retroactive to the date of the posting, May 2, 1997. W. Va. Code § 18A-4-8b provides in its final paragraph:

> Further, employees denied promotion or employment in violation of this section shall be awarded the job, pay and any applicable benefits retroactively to the date of the violation and shall be paid entirely from local funds.

Absent this statutory mandate, the undersigned would limit Grievant's relief to August 26, 1997, based upon the request on her grievance form, and at the Level II hearing. The statute, however, is clear. The violation occurred when the position was not filled on the twentieth working day after the posting, June 2, 1997.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar.

28, 1996).

2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). That discretion extends only to those matters not dictated by statute or regulation.

3. The Mingo County Board of Education clearly exceeded its discretion in assigning Ms. Dillon to a posted position for which she did not apply, when Grievant had applied and held the necessary qualifications. Webster County Bd. of Educ. v. Johns, 191 W. Va. 664 (1994)

4. The Mingo County Board of Education violated W. Va. Code § 18A-4-8b when it failed to fill the posted position of Autism Mentor/Aide at Varney Grade School within 20 working days of the date of the posting. Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993).

5. Grievant proved she should have been selected on June 2, 1997, for the posted position of Autism Mentor/Aide at Varney Grade School.

Accordingly, this grievance is **GRANTED**. The Mingo County Board of Education is **ORDERED** to place Grievant in the Autism Mentor/Aide position at Varney Grade School, to pay her back pay with interest from June 2, 1997, less any amount she has earned as a substitute employee of the Mingo County Board of Education since that date, to provide her with all benefits to which she would have been entitled had she been placed in the position on June 2, 1997, and to adjust her seniority accordingly.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 30, 1998

Footnote: 1

Although the posting refers to the position as "Autistic Mentor," the statutory definition found in W. Va. Code § 18A-4-8 refers to the position as "Autism Mentor," and that is how the position will be referenced in this Decision.

Footnote: 2

Grievant also sought reimbursement of the expense incurred by her in obtaining Autism Mentor training. This claim, however, was not pursued in the evidence or argument presented by Grievant, and is considered abandoned.

Footnote: 3

The record does not reflect the date this grievance was filed, or what occurred at Level I. Ms. Dillon intervened at Level II. A Level II hearing was held on September 11, 1997, and the grievance was denied at Level II on September 18, 1997. Grievant waived Level III, appealing to Level IV on September 22, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on October 27, 1997, at which time the parties agreed to supplement the Level II record only with Joint Exhibit 1. This grievance became mature for decision on November 17, 1997, upon receipt of Grievant's written argument. Respondent declined to submit written argument.

Footnote: 4

The grievance statement refers to the fact that Ms. Dillon did not apply for the position at issue, and the evidence on this point was developed at the Level II hearing. Grievant's attorney did not address this issue in his opening or closing statements at the Level II hearing, but raised it again in Grievant's post-hearing written submission at Level IV. Neither Respondent nor Intervenor objected to this argument being raised at this late date. While it has been the practice of this Grievance Board not to allow this type of ambush tactic, rather requiring that the parties be placed on notice of the issues so that they have the opportunity to respond either with dispositive evidence or argument (Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996); See Richmond v.Raleigh County Bd. of Education, Docket No. 92-41-363 (May 27, 1993)), the undersigned will allow the argument as it was raised in the grievance statement in a manner such as to place the parties on inquiry notice, and no objection was received.

Footnote: 5

While it is possible that the position should never have been posted, and that Ms. Dillon could have been transferred into the position, no such argument was presented and no evidence of this was presented.

Footnote: 6

The Level II Decision refers to a statement in the Level II Decision rendered August 14, 1997, in Grievant's previous grievance, as evidence of the State Board of Education mandate. The language of the August 14 Decision, however, indicates that the statement was not based upon evidence in the record, when it begins discussing the State Board of

Education directive with the introductory remark, "[i]t is common knowledge," and makes no reference to any evidence placed in the record. Grievant's Exhibit 3 at Level II.