ELIZABETH KEATLEY,

Grievant,

v. Docket No. 98-29-035

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Elizabeth Keatley, filed this grievance stating:

> **I applied for an English/Language Arts job at Matewan Middle School. The posting specifically said the person must have either a 5-12 or 7-12 English/Language Arts certification. I have a 5-12 English/Language Arts certification and I have been in the Mingo County System since 1995. The job was given to a person that has never been in the system.**

Grievant's requested relief was for the "[j]ob be reposted and hiring done according to 18A- 4-7-A" (sic). (See footnote 1)

This grievance was denied at Level II and apparently waived at Level III. This grievance was then appealed to Level IV. A Level IV hearing was not held as the parties agreed to submit the case on the record below. This case became mature for decision on April 6, 1998, the deadline for the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 2)

Although the record in this case is sparse, the undersigned Administrative Law Judge, after a detailed review of the record in its entirety, makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Sometime during the school year, the Mingo County Board of Education ("MCBOE") posted an opening for an English/Language Arts teacher at Matewan Middle School ("MMS"). The required certification was English/Language Arts 5-12 or 7-12.

2. At the time of the posting, Grievant was employed at Tug Valley High School ("TVHS") teaching French I and II and English. Grievant was the only Foreign Language teacher at

TVHS.

3. Grievant applied for the position at MMS. Amy Fitch, a non-employee, also applied for the position. **(See footnote 3)**

4. Ms. Fitch was certified for the position.

5. Superintendent Everett Conn recommended Ms. Fitch be hired. He did not follow the criteria set out in W. Va. Code § 18A-4-7a when he filled the position at MMS. 6. Mr. Conn believed W. Va. Code § 18-4-10(10), which allows a Superintendent to act for the best interest of the school in case of emergency, gave him the authority to ignore the mandates of W. Va. Code § 18A-4-7a. 7. W. Va. Policy 2510 recommends one unit of a Foreign Language to complete the requirement for graduation. Many colleges either require or recommend a Foreign Language component for acceptance.

8. MCBOE has experienced much difficulty in attracting certified Foreign Language teachers.

9. The position at MMS is for one year only and will not continue for the 1998- 1999 school year.

Issues

This grievance raises the issue of whether not having a Foreign Language teacher at TVHS constitutes an emergency under W. Va. Code § 18-4-10(10), thus, allowing Superintendent Conn the freedom not to follow the hiring mandates set out in W. Va. Code § 18A-4-7a.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18-4-10(10) states:

> **The county superintendent shall:**
>
> **(10) Act in case of emergency as the best interests of the school demand:**

> **Provided, That an emergency as contemplated in this section shall be limitedto an unforeseeable, catastrophic event including natural disaster or act of war: Provided, however, That nothing in this section shall be construed as granting the county superintendent authority to override any statutory or constitutional provision in the exercise of said emergency power except where such authority is specially granted in the particular code section.**

W. Va. Code § 18A-4-7a requires the use of either the first or second set criteria when filling a teaching position. (See footnote 4) Superintendent Conn's failure to apply the criteria set out in this Code Section when filling this position is a violation.

Superintendent Conn clearly stated his concerns for the students at TVHS, and these concerns are certainly understandable. Without Grievant at TVHS to teach French, the TVHS students who wished to attend any college would be severely disadvantaged. However, this occurrence does not constitute an emergency as defined by W. Va. Code § 18-4-10(10). Further, W. Va. Code § 18A-4-7a does not grant a superintendent the authority to override its statutory mandate in case of an emergency. Because Grievant was an employed teacher, with greater seniority, and the proper certification, she had the right to apply and be accepted for the position based on the criteria.

However, because the school year is almost over, the undersigned Administrative Law Judge declines to place Grievant in the MMS position, as it would only serve to unnecessarily disrupt both the students at MMS and at TVHS.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant have the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. The loss of a Foreign Language teacher at TVHS, even though it would prevent the students from meeting the recommended requirements, does not constitute an emergency as defined in W. Va. Code § 18-4-10(10).

3. Grievant has demonstrated MCBOE violated W. Va. Code § 18A-4-7a when it did not utilize the mandated criteria in filling the English/Language Arts position at MMS.

Accordingly, this grievance is GRANTED. However, since the school year is nearly at an end and placing Grievant in the position at this late date would cause unnecessary disruption, the undersigned Administrative Law Judge declines to place Grievant at MMS for the rest of the 1997-1998 school year. However, if, contrary to MCBOE's statements, the position does continue for another year, Grievant's initial relief shall be granted. That is, the position shall be reposted, and Grievant shall be allowed to apply and be considered under the appropriate criteria.

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.

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Janis I. Reynolds

Administrative Law Judge

Dated: May 22, 1998

Footnote: 1

Grievant noted in her proposed Findings of Fact that the Matewan Middle School position was for the 1997-1998 school year only.

Footnote: 2

At level IV, Grievant's proposed Findings of Fact and Conclusions of Law. were completed by her representative, Anita Mitter. No proposals were submitted by MCBOE,and there was no representation noted.

Footnote: 3

The record is silent as to whether any other regular employees applied for the position.

Footnote: 4

The record was silent as to whether Grievant was a permanent or probationary employee. Given her hire date, it is likely Grievant was a probationary employee at the time of the posting.