JAMES B. KING,

Grievant,

v.

DOCKET NO. 03-34-125

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James B. King, filed this grievance against his employer, the Nicholas County Board of Education ("Board") on April 4, 2003:

> I contend that on March 17, 2003, Richwood Jr. High School, C. C. Lester and staff employed a retiree for a long-term teaching position. This is a continuing practice at RJHS of not following county and state policy. At the present time there are two positions there that have sidestepped county and state policy.
>
> The aforementioned position plus a Math class that has been filled with a substitute teacher who is listed on the Dec. 16th, 2002 reserve list as having an expired license.
>
> I feel this is contrary to our own county policy but also violates WV Code 18A-2-3 which clearly states that this expanded use of substitutes can only be allowed in areas where a teacher shortage or a critical need exists.
>
> Further WV Code 18A-2-3 states that a retiree or other option substitute teacher cannot be used where there are potentially qualified applicants available and willing to fill these positions.
>
> I contend these policies were violated when no search was made for qualified teachers from the rather lengthy substitute list.
>
> Relief sought: That these positions be filled with the most qualified persons based upon certification, seniority and without favoritism.

The grievance was denied at level one, and a level two appeal was processed and heard on April

16, 2003, before Thomas K. Fast, Level Two Grievance Evaluator and Superintendent's Designee. Mr. Fast's level two decision of May 12, 2003 (See footnote 1) , dismissed a portion of the grievance related to the math assignment filled by Stella Francis Price asbeing untimely filed, and granted that portion of the relating to services provided by retiree, Carolyn Heltzel. It is from that portion of the level two decision that the Board appealed to level four on May 15, 2003. A level four hearing was held in the Grievance Board's Beckley, West Virginia, office on July 17, 2003, and this grievance became mature for decision on August 17, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant appeared pro se, and the Board was represented by Erwin L. Conrad, Esq., Conrad & Conrad.

SUMMARY OF EVIDENCE

Level Two Joint Exhibit

Ex. 1 -

Grievance process documents.

Level Two Grievant's Exhibits

None.

Level Two Board Exhibits

Ex. 1 -

Professional Teaching Certificate Issued Provisionally to James King, effective July 1, 2002.

Ex. 2 -

September 6, 2002 letter from Eugene Sparks to Dr. David Stewart.

Ex. 3 -

April 14, 2003 letter from Gus E. Penix to Dr. David Stewart.

Ex. 4 -

March 26, 2003 letter from Gus E. Penix to Dr. David Stewart; April 1, 2003 letter from

Dr. David Stewart to Gus Penix.

Ex. 5 -

March 7, 2003 letter from Alice W. Bailey To Whom It May Concern; April 7, 2003 letter from Janet Singleton To Whom It May Concern;

Ex. 6 -

April 7, 2003 letter from Clifford W. Broggi To Whom It May Concern; April 4, 2003 letter from Jacqueline E. Roach To Whom It May Concern.

Level Four Grievant's Exhibits

None.

Level Four Board Exhibits

Ex. 1 -

Long Term Substitute Permit issued to Stella F. Price, effective November 13, 2000, expiration date June 30, 2003.Ex. 2 -
April 14, 2003 letter from Gus E. Penix to Dr. David Stewart, with attachments.

Ex. 3 -

Substitute Teacher's Timesheets for Carolyn Heltzel, 2002-2003 school year.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of C. C. Lester, Gene Sparks, and Gus Penix.

Based upon a review of the record in its entirety, I find the following facts have been established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant works as a substitute teacher in Nicholas County. He holds a provisional teaching certificate with a specialization in Social Studies, 5-12. LIII R. Ex. 1.

2. Grievant served as a substitute teacher in Nicholas County during the 2000- 2001 school year for nearly 120 days, 2001-2002 for nearly 120 days (mostly at Richwood Junior High School), and 2002-2003 for 80 days.

3. Grievant is not certified in the areas of math or special education.

4. Grievant, Stella Frances Price, and Carolyn Heltzel are all on the approved substitute list for Nicholas County Schools.

5. Nicholas County Schools has a practice of permitting each school to call substitutes, and in a high percentage of the cases the teachers who are seeking the professionals to substitute for them call their own substitute.

6. Ms. Price was called in September 2002, to substitute for a math teacher at Richwood Junior High School for the 2002-2003 school year.

7. Ms. Price did not hold a certification speciality in math, but held a long-term substitute certificate in Music K-12. 8.

Ms. Price was not a retired teacher.

9. When the long-term math substitute teaching position became available, there was not a substitute available with the required certification in math.

10. On March 26, 2003, Superintendent Gus Penix requested a waiver for Ms. Price to teach math at Richwood Junior High School. LIV Bd. Ex. 2.

11. On April 1, 2003, Dr. David Stewart, State Superintendent of Schools, approved the waiver to assign Ms. Price to a position for which she did not hold appropriate licensure. LIV Bd. Ex. 2.

12. Grievant was aware that Ms. Price was assigned to teach math at Richwood Junior High School, and knew she was not certified in math, as early as September 2002.

13. In April 2003, Ms. Heltzel was called to substitute for a special education teacher for the remainder of the 2002-2003 school year. LIV Bd. Ex. 2.

14. Ms. Heltzel did not hold a certification speciality in special education, but was certified in English 7-9, General Science 7-9, Social Studies 7-9, and Elementary Education 1-8.

15.

Ms. Heltzel was a retired teacher.

16. When the long-term special education substitute teaching position became available, there

was not a substitute available with the required certification in special education.

17. On April 14, 2003, Superintendent Gus Penix requested a waiver for Ms. Heltzel to teach Special Education at Richwood Junior High School. LIII Bd. Ex. 3; LIV Bd. Ex. 2. 18. On April 30, 2003, Dr. David Stewart, State Superintendent of Schools, approved the waiver to assign Ms. Heltzel to a position for which she did not hold appropriate licensure. LIV Bd. Ex. 2.

19. On July 22, 2002, the Board enacted its policy entitled “Substitute Professionals in Critical Area of Need”, Policy No. GCBBC-C, and, by letter dated September 6, 2002, sought the approval of the State Board of Education, pursuant to W. Va. Code § 18A-2-3. LIII Bd. Ex. 2; LIV Bd. Ex. 2.

20. On October 17, 2002, the Board's critical need substitute policy was approved by the State Board of Education. LIV Bd. Ex. 2.

DISCUSSION

Grievant argues the Board violated W. Va. Code §18A-2-3 and its own Policy No. GCBBC-C, when it hired Ms. Price and Ms. Heltzel for long-term substitute teaching assignments at Richwood Junior High School during school year 2002-2003. The Grievance Evaluator dismissed the portion of the grievance relating to Stella Frances Price as both untimely and unsubstantiated. He granted the portion of the grievance relating to services provided by retiree, Carolyn Heltzel, finding that retirees could not be used as substitutes at any time without a determination of “critical need”, as set forth in W. Va. Code § 18A-2-3, *infra*.

It is from that holding that the Board appeals pursuant to W. Va. Code § 18-29-3(t), which provides:

> Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) wasclearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary and capricious or characterized by abuse of discretion.

See also, Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992). The Board contends the level two Grievance Evaluator's decision regarding Ms. Heltzel's assignment was contrary to law and clearly wrong.

The level two Grievance Evaluator found there was no evidence introduced to show that the

Board's Policy GCBBC-C was ever approved by the State Board of Education, nor any evidence that the waiver request for Ms. Heltzel was ever approved. Therefore, he held the Board had violated W. Va. Code § 18A-2-3 and its own policy. At level four, the missing pieces of evidence were introduced, showing that both Policy GCBBC-C and Ms. Heltzel's waiver request were approved by the State Board of Education. Therefore, that portion of the Grievance Evaluator's decision is overturned.

The level two Grievance Evaluator, in support of his Decision, also determined that W. Va. Code § 18A-2-3(c) and State Education Policy 5202 (126 CSR 136) prohibit the use of retirees as substitute teachers unless a *critical need* is determined by the County Board of Education and approved by the State Board of Education. This interpretation is contrary to law, clearly wrong, and inapplicable to this case.

West Virginia Code § 18A-2-3, regarding hiring retired teachers as substitutes, provides, in pertinent part:

> (c)(1) The Legislature hereby finds and declares that due to a shortage of qualified substitute teachers, a compelling state interest exists in expanding the use of retired teachers to provide service as substitute teachers. The Legislature further finds that diverse circumstances exist among the counties for the expanded use of retired teachers as substitutes.
>
> (2) A person receiving retirement benefits under the provisions of...[18-7A-1, et seq]...or who is entitled to retirement benefits during the fiscal year in which that person retired may accept employment as a substitute teacher for an unlimited number of days each fiscal year without affecting the monthly retirement benefit to which the retirant is otherwise entitled if the following conditions are satisfied:
>
> (A) The county board adopts a policy recommended by the superintendent to address areas of critical need and shortage;
>
> (B) The policy provides for employment of retired teachers as substitute teachers during the school year on an expanded basis as provided in this subsection.
>
> (C) The policy is in effect for one school year only and is subject to annual renewal by the county board.
>
> (D) The state board approves the policy and the use of retired teachers as substitute teachers on an expanded basis as provided in this subsection; . . ..

In compliance with Code § 18A-2-3, the Board submitted its Policy GCBBC-C for approval to the State Department of Education, which was approved on October 17, 2002. The Board's Policy

provides, in pertinent part:

> The Nicholas County Board of Education shall permit the use of retired professional educators to accept employment for an unlimited amount of days for each school year to address areas of critical need and shortage as referenced by WV Code 18A-2-3.

LIV Bd. Ex. 2.

Finally, State Department of Education Policy No. 5202 (126CSR136) provides:

> A county superintendent who is unable to staff a long-term substitute position with an individual licensed in the area of assignment shall request a waiver from the state superintendent of schools. The written waiver request must indicate the efforts that were made to employ a fully qualified candidate. The state superintendent of schools may grant the waiver if the circumstances warrant such approval. However, the county superintendent must continue to seek the services of an educator with the appropriate endorsement(s) and place this individual in the position at a time determined to be in the best interest of the student.

W. Va. Code § 18A-2-3(c)(1) deals with *expanding* the use of retired teachers as substitutes. It does not state that retirees may not be used as substitute teachers except in cases of critical need. It simply provides a mechanism for expanding the length of time retired teachers may serve as substitute teachers without affecting their monthly retirement benefits. W. Va. Code §§ 18-7A-1, *et seq*, references the number of days which retired teachers may serve as substitutes without a reduction of their benefits, which is governed by regulation. The current regulation provides that teachers may serve 120 days as substitutes without diminution of their retirement benefits. Section 18A_2-3(c)(1) was designed to allow retirees to serve *beyond* 120 days without diminished benefits in certain critical need cases.

Richwood Junior High School Principal C. C. Lester testified that the practice at his school is, for short-term substitute assignments, the teachers call their own substitutes. For long-term assignments, he reviews the substitute list, and calls the substitute. The list may have 40 substitutes listed, but not all are available. In this case, he went through the list and found one person certified in special education, and that person refused the assignment. Ms. Heltzel had substituted at his school before, and had served in some short-term assignments in special education. He asked her if she was interested in the position, and she accepted.

As a result, Personnel Director Gene Sparks prepared a letter for Superintendent Gus Penix's signature, requesting a waiver from the State Board of Education so that Ms. Heltzel could teach

special education without being certified. Mr. Sparks testified this was not a critical need case which would trigger W. Va. Code § 18A-2-3 or Policy GCBBC-C. Ms. Heltzel was on the substitute list, and she was not being asked to serve in the positionmore than the allowable 120 days. Therefore, the only action that was required was to get a waiver from the State Board of Education allowing her to teach special education without certification.

In this case, no one contended that Ms. Heltzel had served more than 120 days as a substitute at the time the grievance was filed. Therefore, the provisions upon which Grievant rely, and the level two Grievance Evaluator mistakenly based his decision, are inapplicable.

Finally, with regard to Ms. Price, Grievant attempted to revive his claim against her hiring at level four, claiming that hiring of substitutes without certification was a continuing practice which would toll the time limit for filing his grievance.

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 18-29-4(a) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievant is challenging the hiring of Ms. Price as a substitute math teacher without possessing the appropriate certification. Grievant knew in September 2002 that Ms. Price had been hired as a substitute math teacher, and also knew she did not possess the appropriate certification. Those are the facts giving rise to his grievance regarding Ms. Price, and her continuing to teach in that

assignment does not convert the event of her hiring into a continuing violation. See Garvin, supra. The grievance was not timely filed, and Grievant has not presented any justification for his failure to timely file his grievance with respect to the hiring of Ms. Price.

CONCLUSIONS OF LAW

1. Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary and capricious or characterized by abuse of discretion. W. Va. Code § 18-29-3(t). See also, Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992).

2. West Virginia Code § 18A-2-3, regarding hiring retired teachers as substitutes, provides, in pertinent part:

> (c)(1) The Legislature hereby finds and declares that due to a shortage of qualified substitute teachers, a compelling state interest exists in expanding the use of retired teachers to provide service as substitute teachers. TheLegislature further finds that diverse circumstances exist among the counties for the expanded use of retired teachers as substitutes.
>
> (2) A person receiving retirement benefits under the provisions of...[18-7A-1, et seq]...or who is entitled to retirement benefits during the fiscal year in which that person retired may accept employment as a substitute teacher for an unlimited number of days each fiscal year without affecting the monthly retirement benefit to which the retirant is otherwise entitled if the following conditions are satisfied
>
> :
>
> (A) The county board adopts a policy recommended by the superintendent to address areas of critical need and shortage;
>
> (B) The policy provides for employment of retired teachers as substitute teachers during the school year on an expanded basis as provided in this subsection.
>
> (C) The policy is in effect for one school year only and is subject to annual renewal by the county board.
>
> (D) The state board approves the policy and the use of retired teachers as substitute teachers on an expanded basis as provided in this subsection; . . . .

3. In compliance with W. Va. Code § 18A-2-3, the Board submitted its Policy GCBBC-C for approval to the State Department of Education, which was approved on October 17, 2002. The Board's Policy provides, in pertinent part:

> The Nicholas County Board of Education shall permit the use of retired professional educators to accept employment for an unlimited amount of days for each school year to address areas of critical need and shortage as referenced by WV Code 18A-2-3.

4. State Department of Education Policy No. 5202 (126CSR136) provides:

> A county superintendent who is unable to staff a long-term substitute position with an individual licensed in the area of assignment shall request a waiver from the state superintendent of schools. The written waiver request must indicate the efforts that were made to employ a fully qualified candidate. The state superintendent of schools may grant the waiver if the circumstances warrant such approval. However, the county superintendent must continue to seek the services of an educator with the appropriate endorsement(s) and place this individual in the position at a time determined to be in the best interest of the student.

5. W. Va. Code § 18A-2-3(c)(1) deals with *expanding* the use of retired teachers as substitutes. It does not state that retirees may be used as substitute teachers only in cases of critical need. It simply provides a mechanism for expanding the length of time retired teachers may serve as substitute teachers without affecting their monthly retirement benefits.

6. W. Va. Code §§ 18-7A-1, *et seq*, references the number of days which retired teachers may serve as substitutes without a reduction of their benefits, which is governed by regulation. The current regulation provides that teachers may serve 120 days as substitutes without diminution of their retirement benefits.

7. Ms. Heltzel did not serve in a substitute capacity for more than 120 days at Richwood Junior High School; therefore, W. Va. Code § 18A-2-3 and Policy GCBBC-C simply do not apply to her situation.

8. Ms. Heltzel received a waiver from the State Board of Education to teach Special Education in compliance with Policy 5202.

9. W. Va. Code § 18-29-4(a) provides, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent

> occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

10. Grievant knew in September 2002, that Ms. Price had been hired as a substitute math teacher, and did not possess the appropriate certification at that time. Grievant did not file his grievance until April 2003. Therefore, the grievance with respect to Ms. Price is untimely filed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: September 4, 2003

Footnote: 1

The level two decision is erroneously dated December 12, 2002.