THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

AVERY RAY BAILEY,

Grievant,

v.

Docket No. 07-33-400

MCDOWELL COUNTY BOARD OF EDUCATION, and

DEPARTMENT OF EDUCATION,

Respondents.

DISMISSAL ORDER

Grievant Avery Ray Bailey filed this grievance on June 8, 2007, asserting that the McDowell County Board of Education violated W. Va. Code § 18A-4-7a, by failing to provide him an opportunity to interview for the position of superintendent. Grievant's relief sought is that the hiring process for superintendent be reopened and that qualified applicants, including Grievant, be given proper consideration. After denials at the lower levels, Grievant appealed to level four on October 17, 2007. (See footnote 1) By Order entered on April 10, 2008, the West Virginia Department of Education was joined as a party respondent pursuant to 156 C.S.R. 1 § 6.13. A phone conference was conducted by the undersigned Administrative Law Judge on August 6, 2008, to address the Respondents' Motions to Dismiss. At the conclusion of the phone conference, the parties agreed that the motions were mature for decision as a matter of law. Grievant was represented by Ben Barkey, West Virginia Education Association. The McDowell County Board of Education appearedby Kathryn R. Bayless, Esquire. The Department of Education appeared by Heather L. Deskins, its Counsel. The following facts are undisputed:

Findings of Fact

1. Grievant has been employed by the McDowell County Board of Education as Principal of Iaeger Elementary School since 2000.

2. In 2001, the West Virginia Department of Education intervened in the operations of the McDowell County Board of Education, limiting its authority as to the employment of school personnel, by delegating this authority to the State Superintendent of Schools.

3. In 2002, the West Virginia Department of Education posted on its website a "Request for Expression of Interest" for the position of Superintendent of Schools for McDowell County.

4. Grievant submitted an expression of interest for the position to the West Virginia Department of Education; however, he was not granted an interview.

5. Suzette Cook was appointed Superintendent of McDowell County Schools in 2002 by the State Superintendent of Schools.

Discussion

Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2008), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

Respondents assert that this matter should be dismissed because Grievant has asserted no claim upon which relief can be granted in pursuing an interview for thesuperintendent position, as that position is an officer and not an employee. Additionally, Respondents point to W. Va. Code § 18-2E-5(p)(4)(C) giving the State Superintendent of Schools sole discretion to hire administrators in counties under state intervention without regard to the provisions of W. Va. Code § 18A-4-7a.

While Grievant does cite W. Va. Code § 18A-4-7a as defining the criteria by which a county board of education must evaluate a prospective professional employee, a Superintendent is an officer of the board, not an employee, and a different standard applies. "A county Superintendent of Schools, elected and appointed by the board of education pursuant to W. Va. Code § 18-4-1, is an officer of the school board, and not an employee within the meaning of W. Va. Code §§ 18-29-1, *et seq. Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987). *See Lookabill v. Wyoming County Bd. of Educ.*, 172 W. Va. 225, 304 S.E.2d 886 (1980); *Jackson v. Bd. of Educ.*, 128 W. Va. 154, 35 S.E.2d 852 (1945); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97- 26-234 (Feb. 27, 1998)." *Freeman v. Fayette County Bd. of Educ*., Docket No. 02-10-154 (Sept. 6, 2002). As

such, the Grievance procedure is not meant to apply to claims relating to that position. *See Freeman, supra*.

As noted by the West Virginia Supreme Court of Appeals in *Blackwell v. Wyoming County Board of Education*, 180 W. Va. 1, 375 S.E.2d 25 (1988), other provisions of school personnel laws do not apply to the position of superintendent unless the application of such a provision was clearly intended. There is no language in W. Va. Code § 18A-4-7a which would support a clear intention for the application of that statute to the selection of an individual for the position of superintendent. A superintendent and an employee have verydifferent relationships with a Board of Education. A superintendent works closely with the board and is secretary to the board while an employee, because of his lack of direct contact with the Board of Education, is accorded certain statutory rights, such as the right to file a grievance, which are not accorded to a superintendent. *Blackwell*, *supra*.

The West Virginia Code grants the Department of Education, and State Superintendent, broad powers once it intervened into the operations of McDowell County Schools, including the ability to make hiring decisions with regard to administrator positions. Specifically, W. Va. Code § 18-2E-5(p)(4)(C) provides the following:

> [t]he state board shall intervene in the operation of the school system to cause improvements to be made that will provide assurances that a thorough and efficient system of schools will be provided. This intervention may include, but is not limited to, the following:
>
> (v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:
>
> (I) Delegating to the state superintendent the authority to replace administrators and principals in low performing schools and to transfer them into alternate professional positions within the county at his or her discretion; and
>
> (II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the state superintendent to be the most qualified for the position. Any authority related to intervention in the operation of a county board granted under this paragraph is not subject to the provisions of article four [§§ 18A-4-1 et seq.], chapter eighteen-a of this code;

The Legislature clearly grants the State Superintendent the authority to fill the position to which Grievant asserts he is entitled to be considered. Furthermore, the statute indicates this authority is not subject to W. Va. Code §§ 18A-4-1, *et seq*. Therefore, Grievant cannot assert a claim based on this statute, as the above provisions of W. Va.Code § 18-2E-5(p) specifically supersede the provisions of § 18A-4-7a. *See Mahone v. McDowell County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008). Based upon the lower level record and pleadings submitted by Grievant, this grievance fails to state a claim upon which relief can be granted.

The following conclusions of law support the decision reached.

Conclusion of Law

1. "A county Superintendent of Schools, elected and appointed by the board of education pursuant to W. Va. Code § 18-4-1, is an officer of the school board, and not an employee within the meaning of W. Va. Code §§ 18-29-1, *et seq. Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987). *See Lookabill v. Wyoming County Bd. of Educ.*, 172 W. Va. 225, 304 S.E.2d 886 (1980); *Jackson v. Bd. of Educ.*, 128 W. Va. 154, 35 S.E.2d 852 (1945); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97- 26-234 (Feb. 27, 1998)." *Freeman v. Fayette County Bd. of Educ.*, Docket No. 02-10-154 (Sept. 6, 2002).

2. The Grievance procedure is not meant to apply to claims relating to the selection of a superintendent. *See Freeman*, *supra*.

3. West Virginia Code § 18-2E-5(p) specifically grants the power to fill the positions of administrators and principals in school systems under state intervention to the State Superintendent of Schools. *Mahone v. McDowell County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008).

Based upon the foregoing, the Respondents' Motions to Dismiss are **GRANTED** and the above-styled action is **DISMISSED** due to Grievant's failure to state a claim upon which relief may be granted.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (*See Footnote 1, supra)*. Neither the West Public 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.

Date: September 11, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007.