WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES NELSON,
Grievant,

v. **Docket No. 2009-0044-LinED**

LINCOLN COUNTY BOARD OF EDUCATION,
and WV DEPARTMENT OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, James Nelson, filed a grievance on July 17, 2008, asserting that the Lincoln County Board of Education ("LCBOE") violated W. VA. CODE § 18A-4-7a, in transferring him to a vacant position, while failing to remove the least senior vice principal to provide a position for him. The relief requested by Grievant is "placement back in position at West Hamlin Elementary."

A level one conference was held on August 14, 2008. The grievance was denied in a level one decision dated August 28, 2008. Grievant appealed to level two and the West Virginia Department of Education ("DOE") was joined as a Responding party. On October 14, 2008, prior to the level two mediation session, Respondent LCBOE, by Counsel, tendered a Motion to Dismiss this grievance. The January 29, 2009 mediation of this matter was unsuccessful. Subsequently, Respondent LCBOE revised and renewed its motion to dismiss this grievance. The parties were given liberty to present argument addressing the issue(s) highlighted and presented by the dismissal motion(s). A level three hearing was scheduled on April 21, 2009. Grievant was represented by Ben Barkey, West Virginia Education Association. The Lincoln County Board of Education appeared by Rebecca Tinder, Esquire. The West Virginia Department of Education appeared by its

counsel, Heather L. Deskins. Subsequent to discussion and reiteration of points discussed in filed documents, the parties agreed that the motion to dismiss is mature for decision as a matter of law. The Motion to Dismiss became mature for decision on April 21, 2009.

Synopsis

Grievant contends that transferring him to a vacant position, while failing to remove a less senior vice principal to provide a position for him is in violation of W. VA. CODE § 18A-4-7a. Respondents argue that this section is not controlling in this matter because Lincoln County Board of Education is under State intervention. 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. Furthermore, WEST VIRGINIA CODE §18-2E-5 indicates this authority is not subject to WEST VIRGINIA CODE §§ 18A-4-1, *et seq*. Accordingly, the State Superintendent is not obligated to comply with W. VA. CODE § 18A-4-7a in making employment decisions regarding administrative school personnel in school systems under State intervention. Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with W. VA. CODE § 18A-4-7a, which is not controlling, this grievance fails to state a claim upon which relief can be granted. The following facts are undisputed:

Findings of Fact

1. Grievant is employed by the Lincoln County Board of Education ("LCBOE") as an assistant principal. The record does not provide the total number of years Grievant has been employed by Respondent LCBOE.

2. In the Spring of 2008, Grievant was notified that his assistant principal position at West Hamlin Elementary would be eliminated. Subsequently, he was transferred to a vacant position at another Lincoln County School.

3. Grievant initiated this grievance on July 17, 2008, following his transfer to a vacant assistant principal position at Duvall PreK-8 School.

4. In June 2000, the West Virginia Department of Education ("DOE") intervened in the operations of the Lincoln County Board of Education, limiting its authority as to the employment of school personnel and delegating this authority to the State Superintendent of Schools.

5. At all times relevant to this grievance, the State Board of Education has been in control of personnel decisions for Lincoln County Board of Education as a result of intervention, pursuant to W. VA. CODE § 18-2E-5.[1]

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."

Grievant's assertions against the decision(s) made in this case by the State Superintendent of Schools is based largely on the contention that the Superintendent failed to comply with W. VA. CODE § 18A-4-7a. Respondents contend that this matter should be

[1] State intervention included "[d]elegating 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." W. VA. CODE § 18-2E-5p(4)(C)(v)(II).

dismissed because Grievant has asserted no claim upon which relief can be granted in pursuing that Respondent failed to follow W. VA. CODE § 18A-4-7a. Respondents point to W. VA. CODE § 18-2E-5(p)(4)(C) giving the State Superintendent sole discretion to hire administrators in counties under State intervention without regard to the provisions of W. VA. CODE §§ 18A-4-1, *et seq*.

The West Virginia Code grants the Department of Education and State Superintendent broad powers once the State has intervened into the operations of Lincoln County Schools, including the ability to make personnel decisions with regard to vacant principal and administrator positions.[2] 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:
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> (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;

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[2] W. VA. CODE § 18-2E-5 creates a hiring scenario that is peculiar to counties that are under the control of the State Board of Education. Further, Respondent DOE highlights that W. VA. CODE § 18-2E-5 was passed to enable the State Board of Education to effectively deal with the types of irregularities that exist in intervention counties in an efficient and direct manner.

The Legislature clearly grants the State Superintendent the authority and discretion to make administrative personnel decisions in intervention counties. 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 solely on the Superintendent's [Respondent DOE] alleged failure to comply with W. VA. CODE § 18A-4-7a. *See Mahone v. McDowell County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008); *Hicks v. Mingo County Bd. of Educ.*, Docket No. 07-29-054 (April 23, 2008).

Throughout this grievance, the sole basis for the claim is reliance on W. VA. CODE § 18A-4-7a and the assertion that it contains the relevant criteria for the personnel decision at issue, particularly as it relates to Grievant's transfer and his placement into a vacant vice principal position. To date, Grievant has failed to articulate any reason why the State Superintendent's decision was arbitrary and capricious. In Grievant's response to the Motion to Dismiss, Grievant disagrees that W. VA. CODE § 18-2E-5p(4)(C)(v)(II) grants the State Board of Education unlimited authority to ignore all provisions of W. VA. CODE § 18A-4-7a. Nevertheless, Grievant's allegation of wrong doing is premised on the contention that the instant personnel action(s) was not made pursuant to W. VA. CODE § 18A-4-7a. Grievant cannot assert a claim based on this statute, as the above provisions of W. VA. CODE § 18-2E-5(p) supersede its applicability in counties under State intervention. *Mahone, supra*; *Hicks, supra; also see Bailey v. McDowell County Bd. of Educ.*, Docket No. 07-33-400 (Sept. 11, 2008); *Spencer v. McDowell County Bd. of Educ.*, Docket No. 2008-0957-McDED (Sept. 26, 2008); *Henry v. McDowell County Bd. of Educ.*, Docket No. 07-33-009 (Dec. 8, 2008). W. VA. CODE § 18A-4-7a was pre-empted by W. VA. CODE § 18-2E-

5 when the West Virginia Board of Education intervened into the operation of Lincoln County Schools, meaning the State Superintendent was under no obligation to comply with W. VA. CODE § 18A-4-7a, per se. Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with W. VA. CODE § 18A-4-7a, which is not controlling, this grievance fails to state a claim upon which relief can be granted.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Broad 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."

2. 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); *Hicks v. Mingo County Bd. of Educ.*, Docket No. 07-29-054 (April 23, 2008); *also see Henry v. McDowell County Bd. of Educ.*, Docket No. 07-33-009 (Dec. 8, 2008); *Spencer v. McDowell County Bd. of Educ.*, Docket No. 2008-0957-McDED (Sept. 26, 2008)*; Bailey v. McDowell County Bd. of Educ.*, Docket No. 07-33-400 (Sept. 11, 2008).

Based upon the foregoing, the Respondents' Motion to Dismiss is **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. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 13, 2009

Landon R. Brown
Administrative Law Judge