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JOYCE DAVIS

v.

DOCKET NO. 29-86-338-4

MINGO COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a waiver by the Mingo County Board of Education pursuant to WV Code §18-29-4(c). Subsequently, a notice of hearing was duly issued and a hearing was held on January 13, 1987, before John M. Richardson, Hearing Examiner, at 101 Harper Park Drive, Suite D, Beckley, West Virginia. The parties filed proposed findings of fact and conclusions of law which were considered in arriving at this decision.

The grievant, for her complaint, alleges that she learned in October 1985 she was teaching out-of-field and was not eligible to receive her professional certificate. Thereafter, she sought the assistance of her principal, Kenny Lester, who agreed to help. Prior to the beginning of classes for the 1986-87 school year, the principal assigned the grievant to teach English which was within

her certification and reassigned the teacher of those English classes (Donna Cline) to teach the grievant's reading classes. Ms. Cline, while being certified to teach the reading classes, complained about the change of assignment and the respondent board, fearing that Ms. Cline's due process rights under WV Code §18A-2-7 might have been violated, directed that the principal return the grievant and Ms. Cline to their previous assignments. In view of these events, the grievant alleges her reassignment was improper and that she is being required to continue to teach in an area for which she is not certified.

In response, the respondent asserts that the grievant holds a valid three year provisional certificate; that she agreed in her contract to teach reading and that there is no open position for grievant to occupy within her certification/endorsement of teaching English grades 7-12. Additionally, the respondent urges that grievant failed to timely file her appeal of the level one decision.

The facts as revealed by the record are generally uncontested.¹ The grievant was employed under her present contract as a reading teacher at Gilbert Junior High School. She had taught reading at that school the past three years (1982-83, 1983-84 and 1984-85). In response to a request directed to the State Department of Education that the grievant's provisional certificate be converted

¹It appears that only those facts and circumstances surrounding the "timeliness" issue could be considered as having been contested.

to a professional certificate, the respondent and the grievant learned that this conversion could not take place because she had been teaching reading for which she had no endorsement. Her provisional certificate was, however, renewed for another three years.²

Shortly after receipt of this information in October 1985, the grievant was assured by Kenny Lester, the Principal at Gilbert Junior High School, that he would help her in being assigned to teach within her certification area of English (7-12). Following the 1985-86 school year and prior to the beginning of classes in the 1986-87 school year, Mr. Lester assigned the grievant to teach English classes that had been previously taught by Donna Cline. Subsequently, Donna Cline, who was certified to teach reading as well as English, was assigned to teach the reading classes. Upon learning of this change in assignment, Donna Cline complained and asserted that this change was in violation of her right to notice/transfer as set forth in WV Code §18A-2-7.

As a result of Ms. Cline's complaint, the respondent directed, via its Personnel Director, Johnny Fullen, that the teachers be returned to their former assignments.³

² The respondent and the grievant received the information via a letter dated October 18, 1985 from the State Department of Education (Grievant's Exhibit #1).

³ The change of assignments and the return to original assignments all occurred between August 27, 1986 and September 4, 1986.

On September 4, 1986, the grievant filed her first grievance alleging violation of WV Code §18A-2-7 and her assignment to teach classes for which she was not properly certified. On September 9, 1986, Principal Lester denied the grievance. On September 10, 1986, the grievant signed her request for appeal and turned the request over to her representative, Truby Hatfield, for transmittal to Harry Cline, Superintendent of Mingo County Schools. Based upon the only sworn testimony, it appears that Truby Hatfield mailed, by regular U.S. mail, the appeal form to Superintendent Cline on or about September 15, 1986.⁴ The respondent's representative, Johnny Fullen, pointed out that the appeal form was not received until September 22, 1986 as shown by the Superintendent's denial of the grievance as being untimely.

There was no level two hearing or any sworn testimony to substantiate respondent's contention that the appeal was untimely.

⁴ The only witness appearing on behalf of the respondent was Kenny Lester who did not testify concerning the date on which the grievance appeal was received. Notably, the grievance form on which the superintendent's notation appeared was not entered into evidence at the level four hearing.

Following Superintendent Cline's decision to dismiss the grievant's appeal at level two on September 24, 1986, she refiled her grievance at level one on September 29, 1986. Subsequently, the grievance was denied at levels one and two.⁵ The grievance was then waived by the respondent board to level four.

Inasmuch as it is evident that the grievance was improperly dismissed at level two on September 24, 1986, it is unnecessary to pursue the other procedural mishaps.⁶ The net result was that the grievance is now pending at level four without a previous level two hearing. To remand the grievance now would only further confound the problem and ultimately result in the grievance being returned to level four on a question of fact surrounding the untimeliness issue.

In looking to the merits of the grievance, it is clear that neither the grievant nor the respondent was aware of the fact that

⁵The grievance was denied by Principal Lester at level one for the same reasons he had previously stated at level one which were: "I was instructed by the Board office that as a result of a recent hearing examiner's ruling the reassignment of staff was inappropriate."

The grievance was again denied at level two by the Superintendent as being untimely in that it was not filed within fifteen (15) days following the occurrence of the event. It is also noted that no level two hearing was held on this occasion, and therefore, no evidence was adduced to substantiate the untimeliness issue.

⁶This board had repeatedly held that a level two hearing is required pursuant to WV Code §18-29-4(b). Lilly and Moten v. Fayette County Board of Education, Docket No. 10-86-251-4; Yarber v. Fayette County Board of Education, Docket No. 10-86-258-4; Yeager v. Nicholas County Board of Education, Docket No. 34-86-229-4. Without such a hearing, it could not properly be determined that the grievance was untimely.

grievant was teaching "out-of-field" until October 1985 when they were so informed by the State Department of Education. It is at this point that the board came under a duty to take some action.⁷

WV Code §18A-2-1, in pertinent part, provides:

. . All personnel so nominated and recommended for employment and for subsequent assignment shall meet the certification, licensing, training, and other eligibility classifications as may be required by provisions of this chapter and by state board regulation.

The respondent contends that it had no opening in which to place the grievant in October 1986. From the evidence and argument adduced from the record, it appears that the next available opportunity to correct the situation occurred in April 1986 when notices of transfer, assignment, etc., could have been initiated pursuant to WV Code §18A-2-7. While the respondent was aware of the problem, it took no action to transfer or reassign the grievant in April 1986 and when Principal Lester did act it was in August 1986. The Principal's action then was to change the assignment of Donna Cline in order to properly place the grievant.⁸ Shortly thereafter, Principal Lester's reassignment was recinded by authority of the County Superintendent of Schools. While the grievant complains that this change of her assignment back to the teaching of reading violated her right to notice, etc., under WV Code §18A-2-7, this contention has little

⁷See Cruciotti v. Ohio County Board of Education, Docket No. 35-86-110. See also WV Code §18A-3-1.

⁸Donna Cline complained about her assignment because she believed that her right to notice, etc., under WV Code §18A-2-7 was being violated.

merit.⁹ It is apparent that Principal Lester acted prematurely pursuant to his authority under WV Code §18A-2-9 in that his action was not based upon a recommendation to the Superintendent as also provided in WV Code §18A-2-9. In pertinent part, WV Code §18A-2-9 provides:

. . The principal may submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to the school or schools under said principal's control. Such recommendation shall be submitted in writing as prescribed by the superintendent . .

Since it has been concluded that the respondent had a duty to act upon learning of the grievant's credential problems, it is incumbent that it do so in a proper and expeditious manner. Clearly, the respondent neglected this duty in April 1986 and should now remedy the situation expeditiously.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. The grievant, Joyce Davis, is a regularly employed classroom teacher assigned to Gilbert Junior High School.
2. The grievant is provisionally certified to teach English (7-12) and has no endorsement to teach reading.

⁹ In arriving at this conclusion, this hearing examiner is not in any way weighing the merits of any complaint that Donna Cline may have had or made.

3. The grievant has been assigned to teach reading (7-8) since the 1982-83 school year.

4. In October 1985, both the respondent and the grievant learned for the first time that the grievant was teaching out-of-field.

5. The respondent failed to take appropriate action during the 1985-86 school year and particularly in April 1986.

6. The respondent failed to conduct a level two hearing.

7. The grievant's appeal to level two was not untimely.

CONCLUSIONS OF LAW

1. Pursuant to WV Code §18A-2-1, a county board of education has a duty to ensure that all professional personnel meet the certification, licensing, training and other eligibility requirements as may be required by law or state board regulation. Cruciotti v. Ohio County Board of Education, Docket No. 35-86-110.

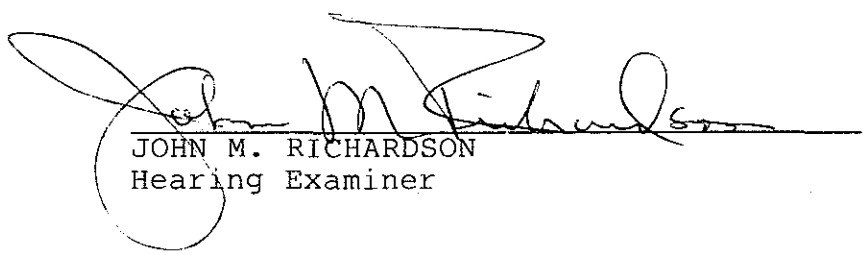
2. WV Code §18-29-4(b) requires that a chief administrator or his designee conduct a level two hearing within five days of receiving an appeal. Yeager v. Fayette County Board of Education, Docket No. 10-86-229-4.

3. Administrative notice will not be taken that a grievance has been untimely filed and must be proven by the party asserting the untimeliness. Burton v. Boone County Board of Education, Docket No. 03-86-098.

4. In this grievance the return of the grievant to her original teaching assignment, when the initial change was in violation of WV Code §18A-2-9, was not a violation of WV Code §18A-2-7.

Accordingly, the grievant is entitled to placement within her teaching certification and the Mingo County Board of Education has a duty to see that she is expeditiously and properly placed and to that end, this grievance is GRANTED.

Either party may appeal this decision to the Circuit Court of Mingo County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (WV Code §18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



JOHN M. RICHARDSON
Hearing Examiner

DATED: April 1, 1987