



REPLY TO:
101 Harper Park Drive
Suite D
Beckley, WV 25801
Telephone: 255-6155

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

RUTH MURPHY

v.

DOCKET NO. 29-86-341-4

MINGO COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a written waiver of consideration at level three.¹ A level four hearing was held on February 6, 1987 before John M. Richardson, Hearing Examiner, following which the parties jointly waived the requirement that a decision be rendered within thirty days. Subsequently, the respondent filed proposed findings of fact and conclusions of law which were considered in arriving at this decision.

¹The grievance was originally assigned to this hearing examiner on November 26, 1986. Notice of hearing was duly issued; however, at the request of the parties, the grievance was remanded to level two for a hearing and decision. Following a hearing and decision, the grievant again appealed to level four on January 16, 1987.

The grievant, Ruth Murphy, complains that a third grade classroom teacher's position became vacant at Nolan Grade School and that the position was filled without posting, thereby depriving her of the opportunity to apply in violation of WV Code §18A-4-8b. The grievant desires that the position be declared vacant and that it be filled in accordance with WV Code §18A-4-8b.

In denying any violation of school law, the respondent asserts that the grievance was untimely filed and that the position was filled in accordance with the authority invested in school principal's pursuant to WV Code §18A-2-9.

The evidence reveals that at the end of school year 1985-86, it was known that Anna Marcum, a third grade teacher assigned to Nolan Grade School, was going to retire. At that time John Preece, Principal of Nolan Grade School, informed those teachers who inquired about the position, that he did not want to select anyone then and that the position would be posted after the summer.

When school resumed in late August 1986, another teacher, Edith Alby, was transferred to Chattaroy Grade School and due to lack of enrollment, only one of the two previous first grade teachers was needed.² Mr. Preece, being aware of his own application for transfer, called a meeting of the interested teachers and suggested

²Grievant was the first grade teacher, who because she lacked seniority over the other first grade teacher, believed that she was the teacher who was to be moved. She sought the vacant third grade teacher's position created by Anna Marcum's retirement.

that Ms. Chapman take the fourth grade, Ms. Sword take the third grade and that grievant move to the fifth grade.³

The grievant, believing the move to be temporary and until the position was posted, reluctantly agreed to the principal's plan. Subsequently, Principal Preece was transferred and Principal Mitchell Chapman was assigned to Nolan Grade School on September 26, 1986.

Shortly thereafter and on October 23, 1986 when it became apparent that there would be no posting of the third grade teacher's position, the grievant filed her grievance.

While it is apparent that grievant waited longer than fifteen days to file her grievance after she was assigned to the fifth grade and Ms. Sword was assigned to the third grade (August 24, 1986), it is also clear from Principal Preece's testimony that he had informed the teachers of his impending transfer and was reluctant to make any permanent assignments. Additionally, he had informed the interested teachers, including the grievant, that the vacancy would be posted. In reliance upon this representation, the grievant waited for the new principal to come in and look into the matter. When the grievant learned that the new principal was not going to post the position, she filed her grievance which occurred

³One teacher, Ms. Chapman, had been teaching the same group of students from the first grade through the fourth grade. Principal Preece felt that she should be changed for the 1986-87 school year for the benefit of both students and teacher. Therefore, Ms. Chapman was held at the fourth grade level (Edith Alby's vacancy) and thereby a vacancy was created for those students going in to the fifth grade, who were previously taught by Ms. Chapman.

nineteen working days after the new principal assumed control on September 26, 1986.

Had the grievant not been misled, her filing would have been untimely but under the circumstances her late filing can be attributed to excusable neglect, in that the grievant has demonstrated a valid reason for the delay. Scarberry v. Mason County Board of Education, Docket No. 26-86-291-1.

With regard to the vacancy/intrabuilding transfer issue, this board has held, pursuant to WV Code §18A-4-8b, that where the evidence indicates a vacancy existed, a board of education is required to post and date notices of all job vacancies for established existing or newly created positions in a conspicuous working place for at least five working days. Peters v. Mercer County Board of Education, Docket No. 27-86-144-1.

Upon close examination of the movement of teachers, it is apparent that at least one vacancy was filled without the required posting. Therefore, in accordance with WV Code §18A-4-8b and Peters, supra, the assignments made by Principal Preece were not proper under WV Code §18A-2-9.⁴

⁴No evidence was introduced showing that the filling of the classroom teacher's position(s) was done on the basis of qualifications, as is also required by WV Code §18A-4-8b.

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

FINDINGS OF FACT

1. The grievant, Ruth Murphy, is a classroom teacher employed by the Mingo County Board of Education and assigned to Nolan Grade School.

2. The retirement of Anna Marcum created a vacancy for the position of a third grade teacher at Nolan Grade School.

3. Mitchell Chapman replaced John Preece as principal of Nolan Grade School on September 26, 1986.

4. Principal Preece informed the grievant and others that the vacancy created by Anna Marcum's retirement would be filled after it was posted. Principal Preece did not want to make any permanent assignments and desired that this be done by his predecessor.

5. Grievant legitimately believed her assignment to teach the fifth grade was subject to the eventual posting of the position/vacancy of that of a third grade teacher.

6. The respondent filled the third grade teacher's position via an intrabuilding transfer of a Title I teacher, namely, Ms. Sword.

7. There was no posting of the vacancies created by the retirement of Anna Marcum (third grade teacher) or the transfer of Edith Alby, a fourth grade teacher.

8. The grievant expeditiously filed her grievance after learning that there would be no posting of the vacant positions.

CONCLUSIONS OF LAW

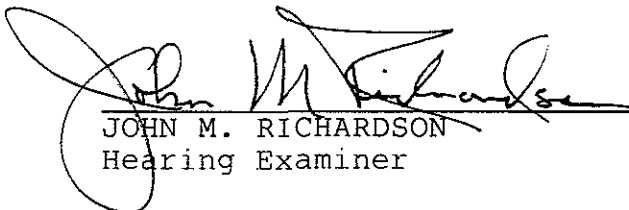
1. Where a grievant demonstrates a valid reason for delay in filing a grievance, the provisions of WV Code §18-29-4(a) (1) permit the application of the concept of excusable neglect so as to permit a resolution of the grievance on its merits.

2. It is incumbent upon an employee to timely pursue their rights through the grievance process and when timeliness is questioned to demonstrate the reason for the delay and/or the applicability of WV Code §18-29-4(a) (1). Scarberry v. Mason County Board of Education, Docket No. 26-86-291-1.

3. Pursuant to WV Code §18A-4-8b(a), county boards of education are required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. Peters v. Mercer County Board of Education, Docket No. 27-86-144-1.

For all of the foregoing reasons, the grievance is GRANTED and the Mingo County Board of Education is ORDERED to post and fill the vacancy which was created by the retirement of Anna Marcum for the upcoming 1987-88 school year in accordance with WV Code §18A-4-8b(a).

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 inform 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: May 28, 1987