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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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GLORIA JUDE

v.

DOCKET NO. 29-87-184

MINGO COUNTY BOARD OF EDUCATION

DECISION

Grievant, Gloria Jude, is employed by the Mingo County Board of Education and is currently assistant principal at Matewan Junior High School. She filed a grievance alleging that the school board had violated an agreement to consider her for the next administrative position when she was not selected as assistant principal at Matewan Junior High School in 1984. A level three hearing was conducted by the school board on January 17, 1985 and appealed to the Education Employees Grievance Board on June 25, 1987; a level four evidentiary

hearing was conducted in Beckley on October, 16, 1987.¹

Grievant has been employed by Mingo County Schools for twenty-six years, twenty-four of which have been served at Mingo High School teaching mathematics (T.7). She received her undergraduate degree from Concord College and a masters degree in secondary education from Marshall University in 1973. In 1980 she applied for the principalship of Matewan High School or any administrative position available there (T.9), and was the sole female applicant; at that time there were no female secondary administrators in the Mingo County

¹ A brief recap of the procedural history of this protracted grievance reveals that grievant first appealed the level three decision to the State Superintendent under the then existing law. However, counsel for the parties could not agree on the final Order to be entered by the school board at level three and in June 1986 then counsel for grievant initiated a mandamus proceeding in the Circuit Court of Mingo County to compel the school board to issue a decision setting forth findings of fact and conclusions of law. There is no notation of the disposition of that mandamus proceeding in this record but an Order was entered by the school board nunc pro tunc on October 13, 1986.

On October 8, 1986 then counsel for the grievant notified the school board that grievant wished to appeal pursuant to W.Va. Code, 18-29-1 but counsel was unable to obtain a copy of the transcript of evidence of the level three hearing, hereinafter cited as (T.__). Grievant thereafter relieved her former lawyer and retained present counsel the day prior to the level four hearing on October 16, 1987. Proposed findings of fact and conclusions of law were submitted by counsel on November 12, 1987.

school system (T.25). Being of the opinion that the position had been awarded to a less qualified, less senior male applicant she filed a complaint with the Human Rights Commission.²

Mr. William Thompson, a representative of the Human Rights Commission, arranged a meeting in Williamson on January 20, 1981 and an agreement, designated as a Pre-Determination Conciliation Agreement, was executed on that date. The agreement recites that in exchange for the promises made by Superintendent Anderson on behalf of the Mingo County Board of Education grievant would be considered for the next available administrative position within Matewan High School; grievant, in turn, agreed to abandon her complaint against the school board.³

² At level four she testified that she wasn't aware of any grievance procedure in Mingo County at the time and that the superintendent of schools at the time, John Anderson, told her to sue if she "did not like the way things were done."

The Human Rights proceeding, styled Gloria A. Jude v. Mingo County Board of Education, Docket No. ES-237-81, was docketed by the Commission on November 21, 1980. (Exhibit 1, attached to level three transcript).

³ Thereafter, by Order entered on January 26, 1981 by Howard D. Kenney, executive director of the Human Rights Commission, the complaint was dismissed.

Grievant testified that Mr. Anderson agreed to her receiving the next administrative position in the school system, which she declined, preferring the next position in the Matewan area. Mr. Anderson denied that he agreed to give her the next administrative position in the Matewan area but promised to consider her if there was an administrative position there or elsewhere and that he would consider grievant as he would any other applicant (T.56,57).

During the period from January 20, 1981 until Mr. Anderson retired there were no available administrative positions at Matewan High School (T.58) but in July 1984 the position of assistant principal at Matewan Junior High School was posted and grievant applied.⁴ She applied by letter to assistant superintendent Conn and also talked personally with superintendent Melmige, who had succeeded Mr. Anderson as superintendent (T.17). Grievant then departed for a Florida vacation and upon her return inquired about the application, since she had not been called in for an interview. She testified that an impromptu interview was set up by Mr. Melmige for her with Mr. Bostic on August 24 and as she was leaving the interview she mentioned the agreement to Mr. Bostic, who responded that it was his opinion that Mr. Anderson could not bind Mr. Melmige by signing the agreement (T.20).⁵ On August 27 grievant learned that Mr. Estepp had been selected for the position and she telephoned Mr. Melmige to remind him of the agreement; he opined that he could not be bound by anything to which Mr. Anderson had agreed (T.22).

⁴ Grievant had known that the position was going to be available and had attended classes at Marshall University to take the courses she needed to reinstate her principal's certificate (T.15,16).

⁵ Mr. Melmige testified that it was not a "sham" interview as asserted by grievant but that he was aware she was going to Florida on vacation and he advised her that he would wait until she returned; that there were two applications, she and Mr. Estepp, and he (Melmige) told her would decide when grievant returned from vacation (T.72,73).

Counsel for grievant contends that grievant is entitled to just compensation and an appropriate administrative position comparable to that she would have been awarded as a result of being passed over in favor of a lesser qualified male as principal at Matewan High School in 1980 and in promoting Mr. Estepp over grievant in a sham operation in 1984 in violation of the 1981 agreement.⁶ Grievant contends she should be awarded the difference in salary of the position of principal at Matewan High School and her present position (\$7,000.00 per year) from 1980 to date because the board violated the agreement, thereby reviving her original gender discrimination claim; that had the board honored the agreement she would now have a permanent certification by having served the three required years in an administrative position.

⁶ It is also contended that school officials harassed grievant in violation of the agreement but there is insufficient evidence in this record to render a decision thereon. Also, at the level four hearing grievant acknowledged that harassment was not the main issue but was a continuing act. She also testified that as of this school year she was moved up to assistant principal of Matewan Junior High School because she was the only qualified applicant.

At level three grievant had requested the board to either pay the difference or create the position of Dean of Girls, (T.5,6,28,42) because she did not desire to remove Mr. Estepp from the position. She felt that Mr. Estepp was a good teacher and would do a good job (T.39,40,41). This was also her position at the level four hearing.

Counsel for the school board contends that the grievant has failed to show that the board failed to follow the ordinary procedures in posting the position in question or was discriminatory in failing to appoint her to the position; that the sole thrust of her grievance is that superintendent Anderson promised to consider her for a position and did not do so; that she was, in fact, considered and that W.Va. Code, 11-8-26 prohibits a local fiscal body from expending money or incurring obligations as would be involved in the instant grievance.⁷ Additionally, counsel asserts that to honor the demands of grievant would require the school board to pay money that was not budgeted and as proscribed in Maynard v. Wayne County Board of Education, 357 S.E.2d 246 (W.Va. 1987).

⁷ At the level three hearing grievant, on cross-examination, testified that she was aware that the superintendent could not bind the board to select a particular employee for a particular position but she expected to get "serious weighted consideration" if she was as qualified or more qualified than the other applicants. (T.27-29). However, she did not feel that she received that type of consideration on her application.

In addition to the foregoing factual narrative, the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education and in 1980 applied for the principalship of Matewan High School or any administrative position available at the school. She was the sole female applicant and at the time there were no female secondary administrators in the Mingo County School System. The position was awarded to a male applicant whom grievant considered less qualified and less senior and she filed a complaint with the West Virginia Human Rights Commission.

2. On January 20, 1981, at the initiation of the Human Rights Commission, a meeting was held in Williamson to attempt to resolve that complaint and in attendance at the meeting were grievant, John Anderson, superintendent of Mingo County Schools, and William Thompson, a representative of the Human Rights Commission. At that meeting a Conciliation Agreement was executed by grievant and superintendent Anderson on behalf of the Mingo County Board of Education providing, in part, as follows:

[R]espondent (school board) agrees to consider complainant for the next administrative position in Matewan High School.

3. From the date of the agreement until Mr. Anderson retired there were no administrative positions available at Matewan High School but in July 1984 the position of assistant principal at Matewan Junior High School became vacant and grievant applied. During this period superintendent Melmige succeeded Mr. Anderson as superintendent of schools and grievant contends that at the time she applied the decision had been made to place Mr. Norwell Estep in the position. She confronted Mr. Melmige with the Human Rights Commission agreement and was informed that he (Melmige) could not by law be bound by an agreement executed by Mr. Anderson.

4. Grievant filed a grievance and an evidentiary hearing was conducted by the Mingo County Board of Education on January 17, 1985 but due to problems primarily involving counsel for the respective parties a final order was not entered by the school board until October 13, 1986. In that grievance grievant alleged that she had an agreement with Mr. Anderson for first consideration for the next administrative position at Matewan High School and the agreement had been breached. Grievant initially requested the board put her in that position with back pay, but at the level three hearing, grievant did not request to remove Mr. Estep from the position but sought to adjust her salary to the level she would have received had she received the appointment, or be appointed to a position of dean of girls or coordinator of math at the school which the board would create or another creative alternative which

would satisfy all parties (T.5,6,40,41,42,45). The board denied the grievance but, as noted earlier, the final decision was not issued until October 13, 1986.

5. Counsel for the grievant contends that grievant is entitled to \$7,000.00 per year from 1980 to date, which is the difference in salary of the position of principal at Matewan High School and her present position because the original claim was revived upon the breach of the agreement by the school board in 1984; that grievant be given an appropriate administrative position comparable to that she would have been awarded but for the gender discrimination practiced by the school board in 1980. She was selected for the position of assistant principal of Matewan Junior High School in the 1986-87 school year but it is not developed what, if any, effect this factor has upon the merits of this grievance. It is clear, however, that grievant does not seek to replace Mr. Estepp in the position.

CONCLUSIONS OF LAW

1. In absence of specific statutory authority the hearing examiner at level four of the grievance procedure does not have authority to direct a county school board to circumvent specific statutes involving the selection and promotion of school personnel.

2. The grievant did not establish that the school board failed to consider her for the position of assistant principal at Matewan Junior High School in 1984 in violation of the Human Rights Commission agreement but did establish that she should have been selected on the basis of qualifications and seniority. However, because grievant does not seek to dispossess the person selected, Norvel Estepp, but instead, seeks money damages for the wrongful denial of the position and would, in part, seek to punish the school board for the failings of counsel, the claim is barred by the doctrine enunciated in Maynard v. Wayne County Board of Education, 357 S.E.2d 246 (W.Va. 1987).

Accordingly, the grievance is Denied.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. 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.