

**REPLY TO:**

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

Offices

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

Members

James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

RITA COMPTON

v.

Docket No. 27-87-281-4

MERCER COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Rita Compton, is employed by the Mercer County Board of Education as a Cook and her initial employment date was September 5, 1979. During the summer of 1987 the Board posted the opening for a Cook at Cumberland Heights Elementary School and grievant applied for the job but it was awarded to a Ms. Marquita Walker. She filed the present grievance in September 1987 alleging Ms. Walker had not actually applied for the position but had been automatically considered for the job because she was on an administrative transfer list and such action was in violation of W.Va. Code, 18A-4-8b and West Virginia Board of Education Policy 5300.

A Level II hearing was held September 24, 1987 and a Level III hearing was held October 26, 1987; the grievance was denied both times although the Board did recommend that certain personnel policies relating to the automatic consideration of employees be reduced to writing.¹ The parties waived an evidentiary hearing at Level IV and submitted the case for decision on the record.

There is no factual dispute in the case as the parties agree Ms. Walker had more seniority than grievant and grievant made formal application for the position and Ms. Walker did not. Sometime during the 1986-87 school term, Ms. Walker's former position was eliminated and she was placed on a transfer list. (T.1,7)² By virtue of her placement on this list she was entitled to the privileges of an unwritten Mercer County Schools policy which automatically placed her name in an applicants' file for any position which subsequently became open and for which she met the qualifications. (T.1,5) The policy further provides that when such an employee was qualified and

¹Transcripts of the Level II and Level III hearings were submitted as evidence by the parties and will hereinafter be referred to as T.1 and T.2, respectively.

²The record does not reveal the school where Ms. Walker was formerly assigned.

the most senior he or she would be notified and given the opportunity to accept or refuse the position. (T.l 5,6) Accordingly Ms. Walker was first contacted about a job opening at Preston but she refused to accept it. (T.l 7,8)³ When notified of the Cumberland Heights Elementary School vacancy she accepted and having had five more days seniority than the grievant was placed in the position. The grievant felt she should have been awarded the job despite the greater seniority for two main reasons:

1. The language of W.Va. Code, 18A-4-8b(b) indicates an employee must apply for a position in order to be considered for it.
2. The policy of the Mercer County Board of Education of automatically giving consideration in its hiring process to employees on the transfer list was not a written policy and as such, is not enforceable under West Virginia Board of Education Policy No. 5300.

The Board's response to grievant's first allegation is simply an assertion that W.Va. Code, 18A-4-8b in no way requires employees to make a bid upon a vacant position but it does place an affirmative duty on the Board to fill positions on the basis of seniority when qualifications and evaluations are not disputed. The Board made no response to grievant's charges concerning Policy 5300.

³The record does not indicate which particular school had the opening.

As revealed by the records of lower levels, the parties have acknowledged the key question in this grievance is the propriety of the Board's procedure used to fill the vacant Cook position but both have mistakenly focused their attention on the language of W.Va. Code, 18A-4-8b(b) dealing with the filling of vacant positions. The transcript of the Level II hearing indicates the applicable law in this case is found in that part of W.Va. Code, 18A-4-8b(b) dealing with the reduction in force of service personnel, which reads:

Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, that if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

Ms. Walker's previous position was eliminated and she was placed on a transfer list triggering the application of this section of the W.Va. Code and the Board was obligated to take certain steps to conform to its provisions. It appears she was a cafeteria manager at another school and in accordance with this reduction in force clause she was to be employed in a different grade of that classification if there was such a vacancy. If there was not a job opening in the cafeteria manager classification, then she was to be employed in any other job classification which she previously held and apparently

in this case Ms. Walker had been a Cook and was therefore notified of a job as such at Preston. She refused it and later accepted the position at Cumberland Heights for which the grievant had applied. This practice of allowing displaced employees a choice in positions is an equitable one but it is clearly contradictory to the reduction in force provisions of W.Va. Code, 18A-4-8b(b). When the Board decided to eliminate Ms. Walker's cafeteria manager position it had the duty at that time to determine if there was a vacancy in a different grade of the classification of cafeteria manager and accordingly transfer her into that position. If no such vacancy existed a determination should have been made concerning vacancies in any other job classification which Ms. Walker previously held. There is no third option in this section of the W.Va. Code and Ms. Walker's employment would have been terminated if no vacancies existed in previously held job classifications.

Although the parties have not addressed through legal argument the pertinent part of W.Va. Code, 18A-4-8b(b) the record is sufficient to show its guidelines were not followed and had they been followed Ms. Walker would not have been an applicant for the Cumberland Heights position. The record also indicates the grievant was the next most senior candidate and should have received the position.

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

FINDINGS OF FACT

1. Grievant, Rita Compton, has been employed by the Mercer County Board of Education since 1979 and is presently classified as Cook II and is assigned to Brushfork Elementary School.

2. Marquita Walker was previously employed as a cafeteria manager by the Mercer County Board of Education and during the 1986-87 school term that position was eliminated and she was placed on a transfer list for the 1987-88 school term.

3. Sometime during the summer of 1987 Ms. Walker was notified of a vacant position for which she was qualified and the most senior and she refused to accept the job.

4. Subsequent to this offer and refusal, a job vacancy in the position of Cook at Cumberland Heights Elementary was advertised and grievant made application for that position and Marquita Walker did not.

5. Marquita Walker and the grievant were both qualified for the vacant position at Cumberland Heights and were the two most senior employees considered for the job with Ms. Walker being the most senior of the two.

6. Marquita Walker was automatically considered for the position in dispute and was awarded the job at the beginning of the 1987-88 school term.

CONCLUSIONS OF LAW

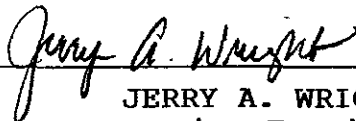
1. In accordance with the provisions of W.Va. Code, 18A-4-8b(b) when a county board of education eliminates a service employee's position it must at the same time determine whether or not a vacancy exists within a different grade of that job classification and if such a vacancy exists, fill it with the employee whose position has been eliminated. If no such vacancy exists the county board of education must then determine whether or not there is an existing vacancy in any other job classification which the employee previously held and fill it with said employee and if no such vacancy exists, that employee is to be terminated.

2. The Mercer County Board of Education failed to follow this procedure when it eliminated Ms. Marquita Walker's cafeteria

manager position and instead place her on a transfer list allowing her a choice as to which vacancy she would fill and this failure on the Board's part resulted in her subsequent selection for a position for which the grievant, Rita Compton, had applied.

Accordingly, the grievance is **GRANTED** and the Mercer County Board of Education is hereby **ORDERED** to instate grievant, Rita Compton, in the position of Cook at Cumberland Heights Elementary School for which she applied and to further compensate her for any loss of wages she may have incurred due to the improper transfer of Marquita Walker.

Either party may appeal this decision to the Circuit Court of Mercer County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. 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.


JERRY A. WRIGHT
Hearing Examiner

DATED: February 29, 1988