



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

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

ARTHUR D. CLONINGER

v.

Docket No. 50-89-028

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievant, a science teacher employed by Respondent Wayne County Board of Education at Fort Gay Middle School, scheduled a conference and filed his grievance on October 24, 1988, alleging as follows:

Grievant was excluded from consideration in bidding on a science opening at Buffalo High School when the position was arbitrarily reposted as Biological Science/Chemistry. The original posting for this science opening was posted as Biological Science/General Science, for which the grievant was fully qualified. This original posting was not filled by the Board, but rather was reposted as indicated above.

The grievance was denied at Level I. On December 7, 1988, the Level II evaluator also denied the grievance, ruling that it was untimely filed. On January 11, 1989, Respondent waived the Level III hearing. Grievant filed at Level IV on

January 16, 1989. A hearing was held April 5, 1989,¹ and proposals were received on and before May 5, 1989.

The opening at Buffalo High School at issue in this case resulted from the transfer from Buffalo High of Paula Staley, who taught science, biology and mathematics. On August 3, a teaching job was posted for general science 7-12 and biological science 7-12, requiring certification in those areas. Grievant, who had the required certification, applied. Superintendent of Wayne County Schools Michael Ferguson and Dennis Bradley, the Principal of Buffalo High, testified that the day after that posting, Mr. Bradley called Mr. Ferguson to tell him that he had been mistaken, for Buffalo needed a teacher certified in chemistry. Accordingly, on August 12th the first posting was withdrawn and replaced with a posting for a position requiring certification in chemistry and biology. Grievant applied for that position also, although he was not certified in chemistry. On August 18th Respondent hired Robert Samuel, who had the required certification for the posted position. Mr. Samuel was scheduled for the fall semester to teach two

¹ Hearings scheduled for March 2 and 20, 1989, were continued at the request of the parties.

At the April 5th hearing the parties agreed that the evidentiary record would consist of the transcript and documentary evidence submitted at the Level II and Level IV hearings.

general science classes, a biology class, a physical environment class, and one section of advanced chemistry.²

The crux of Grievant's complaint is that a chemistry teacher was not needed at Buffalo High and the second posting was tailor-made for Mr. Samuel because Respondent wanted Mr. Samuel as a football coach also. At Level II Grievant testified that he did not know until October 5, 1988, that the person hired would not be a full-time chemistry teacher. He explained, in answer to the question, "[W]hen were you aware that you had a grievance?"

On the 5th of October. I obtained copies of the Buffalo High School schedules for 1988 and 1989 -- or 1988 and 1989 and 1987-1988. At that time, in comparing the two assignments, one was -- the teacher who left was a Mrs. Paula Staley. In comparing the assignment of courses to science teachers in '87-99 and comparing that with what they assigned Mr. Samuel, that fact right there formed the basis for my grievance. And that was because he was teaching one-half of a chemistry course and other courses that I could well have taught.

At Level IV he testified more fully as follows: Approximately a day after the posting was changed he went to Mr. Ferguson. While he had had some doubts about the validity of the second posting, Mr. Ferguson allayed those doubts by convincing him that a chemistry teacher indeed was

² The advanced chemistry course was only for one semester and Mr. Samuel was scheduled to teach genetics the spring semester. In fact, another teacher, Ronald Terry, has been teaching the genetics portion during the Spring semester and another section of biology has been added to Mr. Samuel's schedule.

needed. Nevertheless, after that meeting, he wrote Mr. Ferguson on August 17th as follows:

The part that I don't understand about the decision not to fill the initial posting, and reposting the position for different qualifications, is that Buffalo High School already has a full-time chemistry teacher assigned. Wayne High School, with a much greater enrollment, has only one chemistry teacher assigned.

.

In retrospect, I still cannot shed the nagging intuition that the Buffalo High School position as now posted will result in the hiring of an applicant who is not currently a regular full-time teacher in Wayne County. I guess history will provide the answer.

Mr. Ferguson did not reply to the letter. Grievant also called Ms. Staley, about whom he said, "I admire her more than any teacher that we have in Wayne County," and that he knew she would give him the "straight scoop." The talk with her convinced him that a chemistry teacher was needed at Buffalo High. However, when in October he saw the schedule showing Mr. Samuel teaching advanced chemistry/genetics, a "red flag" was set off because he knew another Buffalo High teacher, Ronald Terry, had taught a similar class. Grievant asked for the prior year's schedule to find that Mr. Terry had indeed then taught a class of advanced science/genetics. Once again he was suspicious that the posting had been manipulated in order to hire Mr. Samuel, since Samuel was a coach. He accordingly contacted his representative and filed his grievance.

Paula Staley's testimony was not consistent with Grievant's. She testified that Grievant called her during the last week of August or the first week of September. She

said that during that conversation Grievant asked her what Mr. Samuel was teaching and she told Grievant that he was teaching advanced chemistry and biology. Upon close questioning, she stated that she was positive that she informed Grievant that Mr. Samuel was teaching only one class of chemistry. She added that, in that there is never more than once advanced class in chemistry, Grievant would in any case have known that Mr. Samuel was teaching only one class of chemistry when informed that he was teaching advanced chemistry. It was also her opinion that Grievant thought from the beginning that an injustice was involved regarding the filling of the teaching position.

W.Va. Code §18-29-4(a)(1) provides as follows:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

At the hearings Grievant contended that, while the "event upon which the grievance is based" of Code §18-29-4(a)(1) was the reposting, his grievance was timely because he did not know that there was a violation of the Code until October 5th.³ It has been held, "A grievance

³ Grievant contended at Level II and initially at Level IV that Respondent violated the requirement of W.Va.
(Footnote Continued)

must be filed within 15 days of the date on which the event becomes known to the grievant, not within 15 days of learning that the event was grievable." Archibald v. Randolph Co. Bd. of Educ., Docket No. 42-88-171 (Dec. 9, 1988) (parentheticals and cites omitted). Harris v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989), held,

Under W.Va. Code §18-29-4(a)(1) the date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or an occurrence of the practice.

(cites omitted). While Grievant framed his argument in line with those decisions, to his detriment, it may be that they would not control if the record shows that he did not know all the critical facts regarding the second posting until October 5th.

However, the record establishes an early suspicion that was never really laid to rest. His letter of August 17th clearly shows a continuing suspicion even after the conversation with Mr. Ferguson. Further, and most importantly, the record does not support that he did not know until October 5th that Mr. Samuel would be teaching only one chemistry course which, according to Grievant's testimony, was the crucial fact that made him think the posting had

(Footnote Continued)

Code §18A-4-8b(a) that a posted notice of a position opening "shall include the job description," but amended the charges pursuant to W.Va. Code §18-29-3(j) to include an allegation of favoritism under W.Va. Code §18-29-3(o).

been manipulated to fit Mr. Samuel's qualifications. Ms. Staley's testimony, in direct contradiction of Grievant's testimony, establishes that she told him the last week of August or the first week of September that Mr. Samuel was teaching only one chemistry course. While Ms. Staley may not have been a totally neutral witness since she stated she was a friend of Mr. Bradley and is still employed by Respondent, although not at Buffalo High, her testimony is found to be more credible than the testimony of Grievant, who has a clear vested interest in denying that he knew the crucial facts earlier, especially since Grievant's own testimony that she would give a "straight scoop" supports Ms. Staley's credibility.

In addition to the foregoing narrative, the following findings of facts and conclusions of law are appropriate.

Findings of Fact

1. On August 3, 1988, Respondent posted a teaching position at Buffalo High School requiring certification in general science and biology.

2. On August 12, 1988, the posting was withdrawn and replaced with a posting for a position requiring certification in biology and chemistry.

3. On August 18, 1988, in order to fill the posted position, Respondent hired Robert Samuel, who was scheduled to teach sciences classes, of which only one, a one-semester

class of Advanced Chemistry, required certification in chemistry.

4. While Grievant had continuing suspicions from at least August 17, he became convinced that the posting had been manipulated in favor of Mr. Samuel upon finding out that Mr. Samuel was teaching only one chemistry class.

5. Grievant was informed the last week of August or the first week of September, 1988, that Mr. Samuel was teaching only one chemistry class.

6. Grievant did not begin the grievance proceedings until October 24, 1989, which was more than fifteen working days from when he learned that Mr. Samuel was teaching only one chemistry class.

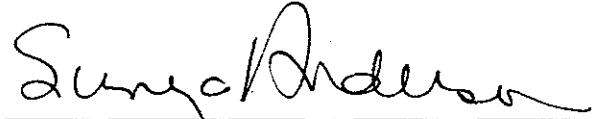
Conclusions of Law

1. The date a grievant determines that the event upon which the grievance is based is grievable or illegal is not the date for determining whether his grievance is filed. Harris v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989); Archibald v. Randolph Co. Bd. of Educ., Docket No. 42-88-171 (Dec. 9, 1988). See also cases cited therein.

2. Grievant failed to timely file a grievance, as required by W. Va. Code §18-29-4(a)(1).

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County and such appeal must be filed within thirty (30) days of receipt of this decision. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



SUNYA ANDERSON
HEARING EXAMINER

Dated: May 18, 1989