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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD
W. GASTON CAPERTON, III
Governor**

DONNA KEATON

v.

Docket No. 45-88-201

SUMMERS COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Donna Keaton, has been employed by the Summers County Board of Education (Board) as a substitute teacher since the beginning of the 1980-81 school term. She filed a grievance on September 8, 1988 alleging that the Board's failure to hire her for permanent positions for which she applied during the summer of 1988 was the result of discrimination and favoritism on the part of Superintendent of Schools Demetrius Tassos. A decision following a Level II hearing held September 23, 1988 was adverse to the grievant and the Board waived Level III proceedings on October 24, 1988. A Level IV hearing was held November 18, 1988. Proposed findings of fact and conclusions of law were received by December 8, 1988.

It is undisputed that during the summer of 1988 the grievant applied for posted classroom teacher positions at Forest Hill, Jumping Branch, Talcott, Sandstone and Bellepoint Elementary Schools and other persons were awarded the jobs. It is also uncontroverted that grievant has been employed as a substitute teacher by the Board for the past eight (8) years and during the 1987-88 school term substituted on one hundred thirty-seven and one-half (137½) days. Grievant possesses a B.A. degree in elementary education and lacks only three (3) college hours toward the completion of a Masters degree in communications.¹

It is the grievant's contention that Mr. Tassos holds certain biases against her because of her personal relationship with a Mr. Luther Wills and the fact that her father is a former Board member. Grievant concedes there has been no overt display of any bias but asserts that it is evidenced by Mr. Tassos' recommendations of persons less qualified than she for the positions in question.² The Board denies any bias on the part of Mr.

¹According to grievant, this degree was previously labeled "speech communications" and is education-oriented with applicability to both elementary and secondary teaching.

²Although the original grievance form at Level I only alleges discrimination, the assertion that the positions were not filled on the basis of qualifications in violation of W.Va. Code §18A-4-8b(a) is implicitly contained therein.

Tassos and maintains the qualifications of all applicants were reviewed and the positions were filled on the basis of those qualifications in accordance with applicable law and county policy.

Initially, it must be noted that grievant did not substantiate her claims that Mr. Tassos engaged in any discrimination against her because of present or past relationships. There was testimony on both sides which revealed the existence of ill-feelings between the superintendent and Mr. Wills but there was no evidence that these feelings were carried over to the process used to fill any of the five (5) vacancies. Grievant did, however, establish that at least one of those vacancies was not filled on the basis of qualifications.

A review of the procedures used in filling the positions at Bellepoint, Forest Hill and Talcott and the qualifications of the persons awarded the positions at those schools reveals no irregularities. The position at Forest Hill was filled by Ms. Carolyn Eller, a teacher who had substituted for the Board from 1985 to 1988 and worked for four (4) years in permanent teaching positions in Greenbrier County (Grievant's Exhibit No. 18). By virtue of this previous experience, Ms. Eller was more qualified than the grievant. The position at Talcott was similarly filled by a more experienced teacher, Ms. Linda Harvey. Ms. Harvey has held a permanent elementary teaching position in Summers County for the past three (3) years. The position at Bellepoint

was filled by a substitute teacher pending the outcome of an appeal of the decision in Davis v. Summers County Board of Education, Docket No. 45-88-133 (August 26, 1988). In that case the grievant, Ms. Wanda Davis, a teacher at Hinton High School, had been placed on a transfer list for reassignment to the position at Bellepoint and her appeal of that action to the West Virginia Education and State Employees Grievance Board was successful and the Board was ordered to remove her name from that list. Since the appeal of that decision to the Circuit Court of Kanawha County may result in Ms. Davis' placement in the Bellepoint position, the Board was justified in not filling it on a permanent basis.³

The position at Jumping Branch was awarded to Ms. Connie Lilly. Ms. Lilly was a substitute teacher for the Board during the 1986-87 and 1987-88 school terms. During the 1987-88 school term, Ms. Lilly, a resident in the Jumping Branch area, frequently worked at the school there and, according to the testimony of the principal, Mr. David Quisenbery, she developed a close working relationship with both students and teachers and exhibited outstanding teaching abilities (T.___). Mr. Quisenbery further testified that she was active in the local chapter of the P.T.A.

³It appears the posting of this position was made in anticipation of Ms. Davis' assignment there and the grievance and subsequent appeal essentially rendered it a temporary one.

and often performed volunteer activities at the school (T.___). According to Mr. Quisenbery, he also had a general knowledge of the grievant's qualifications and felt Ms. Lilly was the more qualified of the two (T.___). It was apparently this conclusion which caused him to strongly recommend her employment in the position to Mr. Tassos. Mr. Tassos subsequently relied on Mr. Quisenbery's assessment and his own general knowledge of the grievant's qualifications when he made his recommendation to the Board. The Board relies on Higgins v. Board of Education of Randolph County, 286 S.E.2d 682 (W.Va. 1982) in support of its contention that reliance on such subjective judgment is permissible in the filling of professional positions.

It is clear that Ms. Lilly's prior service at Jumping Branch made her the preferable applicant as far as Mr. Quisenbery was concerned but that service was merely a circumstance of her previous employment and should not have been considered a qualification. See Wilcox v. Wyoming County Board of Education, Docket No. 55-88-083 (August 2, 1988). It is also apparent that Mr. Quisenbery and Mr. Tassos did not have or seek out adequate information about the grievant's qualifications which might have led to a subjective judgment that she was the more qualified applicant. An adequate exploration of credentials in such cases is required before any subjective judgment developed in the process can be considered informed. It was reliance on informed conclusions

of a subjective nature which the West Virginia Supreme Court of Appeals held permissible and even necessary in Higgins, supra. Nonetheless, county boards of education have substantial discretion in matters relating to the hiring of school personnel, State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (W.Va. 1980); Beverlin v. Board of Education, 216 S.E.2d 554 (W.Va. 1975), and the grievant did not clearly establish in the present case that the Board abused that discretion when the position at Jumping Branch was filled.

The Board's decision to award Ms. Bertha Campbell the position at Sandstone Elementary was apparently based on a misinterpretation of law and it is clear that but for that error the grievant would have gained the position. Ms. Campbell completed her student teaching at Hinton Area Elementary School during the fall of 1987 and was substituting during the remainder of the 1987-88 school term when she was assigned to Hinton High School to fill in for a teacher who had taken a leave of absence effective April 15, 1988. When she began those duties, she was given a probationary contract of employment with a duration of forty-four (44) days. Ms. Campbell was then placed on a "preferred list" and was given priority over the grievant when both applied for the Sandstone position.⁴ There are no provisions contained in

⁴ During the Level IV hearing, in which Mr. Larry Deeds, Elementary Education Supervisor, was subpoenaed but did not appear, counsel for grievant
(footnote cont.)

the West Virginia Code which grant any professional school employees a preferred status in the filling of positions except those of 18A-4-8b(a) dealing with a reduction in force (RIF), which read:

Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter. Provided, That such employee shall be employed in any other professional position where he had previously been employed or to any lateral area for which he is certified and/or licensed if his seniority is greater than the seniority of any other employee in that area of certification and/or licensure.

All professional personnel whose seniority with the county board is sufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list.

(footnote cont.)

agreed to forego his testimony in exchange for a post-hearing submission of documents by Mr. Tassos which would explain how Ms. Campbell was awarded her position. Those documents, cumulatively marked as Joint Exhibit No. 2, include a copy of a posting of the forty-four (44) day position at Hinton High, the probationary contract Ms. Campbell was given, April 19, 1988 Board meeting minutes wherein the contract was approved and a list of personnel entitled "Preferred List (Professional)" which contains typewritten and handwritten names of employees with employment dates noted for some. Ms. Campbell's name is handwritten with a notation "Employed 7-14-88". Since the parties stipulated that these documents would be the complete explanation of the process by which Ms. Campbell achieved the position at Sandstone, it must be assumed that there were no other factors considered when that position was filled.

There was no evidence submitted to show that the Board had initiated any reduction of force in which Ms. Campbell's employment was terminated, see n.4. Moreover, had there been any such actions, she would not have been entitled to placement on a preferred recall list as she was only a substitute teacher at Hinton High filling in for a regularly employed teacher on a leave of absence.

W.Va. Code §18A-2-3 provides for the hiring of substitute teachers as follows:

The county superintendent, subject to approval of the county board, shall have authority to employ and assign substitute teachers to any of the following duties: (a) To fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher.

W.Va. Code §18A-4-7 contains the following provisions for substitute teachers' rate of pay:

The pay of a substitute teacher shall not be less than eighty-five percent of the daily rate of the state basic salary paid to teachers: Provided, That any substitute teacher who teaches in excess of five consecutive instructional days in the same position shall, thereafter, not be paid less than eighty-five percent of the daily rate of the state advanced salary to which his teaching experience entitles him: Provided, however, That any substitute teacher who teaches in excess of thirty days in the same position shall be paid the daily rate of the advanced salary, within his county, to which his teaching experience entitles him, retroactive to the sixth day of employment.

These provisions do not give a county board of education the authority to grant substitutes assigned to a temporary position a preferred status when regular full-time positions are filled. The Board could not grant such status to Ms. Campbell by awarding her a probationary contract for forty-four (44) days. If the position at Hinton High had been permanently vacated and subsequently posted, the successful applicant would have been entitled to such a contract but such was not the case as the position was clearly a temporary one. Ms. Campbell's performance in that assignment was therefore only a part of her overall credentials and a comparison of those credentials with those of the grievant indicates the latter was the more qualified applicant for the position. Ms. Campbell had only achieved her undergraduate degree several months prior to her assignment at Hinton High while grievant lacked only three (3) hours toward a Masters degree and had been under contract with the Board for eight (8) years during which she substituted four hundred sixty-two (462) days. Pursuant to the holding in Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986), that professional positions be filled on the basis of qualifications, grievant should have been awarded the position at Sandstone Elementary.

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

FINDINGS OF FACT

1. Grievant, Donna Keaton, has been employed by the Summers County Board of Education as a substitute teacher since the beginning of the 1980-81 school term and during the summer of 1988 she applied for five posted teaching positions at Bellepoint, Sandstone, Jumping Branch, Talcott and Forest Hill Elementary Schools.

2. Grievant lacks three (3) hours toward completion of a Masters degree in Communications and during her employment with the Board, has substituted on four hundred and sixty-four (464) days, one hundred and thirty-seven (137) of which were during the 1987-88 school term.

3. Grievant was not granted interviews for any of the positions and Superintendent of Schools, Demetrius Tassos, recommended other persons and those recommendations were accepted by the Board.

CONCLUSIONS OF LAW

1. The filling of vacant teaching positions must be based primarily on applicants' qualifications and seniority has a bearing only when applicants' have otherwise equivalent qualifications. Dillon v. Wyoming County Board of Education, 315 S.E.2d 58 (W.Va. 1986).

2. A grievant must prove allegations contained in a grievance by a preponderance of the evidence. Raines v. Mercer County Board of Education, Docket No. 27-88-139 (September 19, 1988).

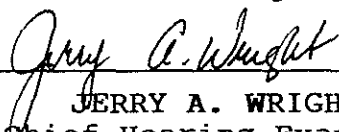
3. The grievant has failed to prove by a preponderance of the evidence that the positions at Talcott, Jumping Branch or Forest Hill Elementary Schools were not filled on the basis of qualifications or that the Bellepoint position was improperly filled pending the outcome of an appeal of the decision in Davis v. Summers County Board of Education, Docket No. 45-88-133 (August 26, 1988).

4. A substitute teacher assigned to a temporary position due to the leave of absence of a full-time teacher does not attain a preferred status which would require a county board of education to grant that teacher any priority when vacancies are filled.

5. By virtue of her previous teaching experience and education the grievant was more qualified than Ms. Bertha Campbell and the Board's decision to grant Ms. Campbell a priority in hiring and the position at Sandstone Elementary was in violation of the provisions of W.Va. Code §18A-4-8b(a).

Accordingly, the grievance is GRANTED and the Summers County Board of Education is hereby ORDERED to instate the grievant, Donna Keaton, to the position at Sandstone Elementary School for which she applied and compensate her for any loss of wages and benefits she may have incurred as a result of the improper filling of said position, less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of Summers 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). 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.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: February 23, 1989