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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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GWEN LUCION, et al.

v.

Docket No. 33-88-172

MCDOWELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, Gwen Lucion, Sandra Kennedy, Cora Kissinger, Theodore Shelton, Regennol Piercy, Fred Smith, Jimmy Hunt, Frank Sexton, Clarence Belcher, Chris Walker, Patsy Mitchell, Lawrence Bowens, Bill Crawley, Rex Sadler, Michael Guella, Kenny Riley, Frank Pence, Randy Hanshaw, Brenda Price, Frances Alger, Glen Shoun, Douglas Wilson, Roberta Smith, Drema Dillon, Dorothy Winebarger, Linda Marrs, John Wilson, Shelby Lundy, Pearl Mullins, Nancy Vance, Carol Kennedy, Troy Johnson, Pat Absure, William Tilley, Joyce Falvo, Alice Smith, Elizabeth Hanshaw, Betty Williams, Shirley Hillyer, Judy Crabtree, Sharon Jones, Shelby Bohin, Vernie Hagerman, Loretta Dial, Barbara Jackson, Shirley Dash, Wanda Hall, Marie Rose, Bobby Rose, David Rose, Linda Potter,

Wanda Belcher, Orban Porterfield, Melda Lockhart, Shelvie Lockhart, Debbie Handy, Nancy Day, Anna Davis, Patricia Rasnake, Pauline Stasheen, Lodema Lester, Bobby Allara, Judy Farmer, Nancy Jarvis, Rodney Walker, Peggy Lambert, Janice Lane, Ruth Snodgrass and Cora Blankenship are all school service employees of the McDowell County Board of Education (Board) serving in various positions and assignments. They filed a grievance at Level I on June 16, 1988 alleging the Board had not posted certain positions before they were filled in violation of W.Va. Code §18A-4-8b. A Level II hearing was held July 21, 1988 and a subsequent decision was adverse to the grievants. The Board affirmed the Level II findings on August 23, 1988. A Level IV hearing was held September 27, 1988. The parties were notified by letter dated January 11, 1989 that, due to a malfunction in recording equipment, there was no record of that hearing. The parties subsequently agreed to a set of factual stipulations and, in a hearing held March 13, 1989, presented testimony concerning a particular issue upon which they could not agree.

The facts giving rise to the grievance are undisputed. During the spring of 1988 the Board was faced with financial constraints which necessitated a reduction of its service personnel staff. Accordingly, certain employees were notified that their employment would be terminated at the end of the 1987-88 school term. Employees with greater seniority than those terminated but whose positions the Board wished to eliminate, were notified they would be placed

on a transfer/unassigned list.¹ During the summer of 1988, employees on this list were called to the central office and offered various positions which had become vacant due to the reduction-in-force or retirements. No posting of these positions was made and only employees on the transfer/unassigned list were allowed the opportunity to bid on or accept them.²

Grievants contend the failure to post the positions was in direct contravention of W.Va. Code §18A-4-8b(b), which provides:

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job.

Grievants maintain that such a posting allows all service employees an opportunity to bid on positions which may be considered preferable in terms of location or school environment.

¹Grievants do not allege any failure on the Board's part to conform to the procedural requirements of W.Va. Code §§18A-2-6 or 18A-2-7 when the terminations or placements on the transfer list were made.

²Apparently during the lower level proceedings a decision was made to post some but not all of the vacancies. At the time of the Level IV hearing, it appeared there were approximately fifteen (15) cook, aide, secretary and custodian positions that were filled but not posted.

The Board essentially contends that its decision to give those employees whose positions were eliminated the first opportunity to fill the positions was in accordance with the reduction-in-force provisions of W.Va. Code §18A-4-8b(b), which read:

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.

It is the Board's position that posting of positions during a reduction-in-force is a useless act since those employees who have lost their position but not their employment must be placed somewhere and posting only prolongs that placement. Implicit in this argument is an assertion that it is more efficient administratively to simply offer the positions to employees actually involved in the reduction-in-force since a posting can result in a reshuffling of a greater number of personnel.³

³Although the testimony was conflicting, it appears that in at least one previous school year, positions were posted during a reduction-in-force. In any event it is apparent the administrative concerns played a major role in the Board's recent decision not to post the positions.

It is clear the grievants' position is correct. There are no exceptions to the requirement contained in W.Va. Code §18A-4-8b(b) that all positions be posted. The requirement obviously places administrative burdens on a county board of education when numerous positions become vacant due to a reduction-in-force but there is no reasonable basis for creating a method of filling those positions which is different from the method used to fill vacancies created by resignations or retirements. The opportunity to apply for vacant positions has been held to be a fundamental right of school employees. Davis v. Summers County Board of Education, Docket No. 45-87-119 (October 13, 1987); Murphy v. Mingo County Board of Education, Docket No. 29-86-341-4 (May 28, 1987); Peters v. Mercer County Board of Education, Docket No. 27-86-144-1 (November 26, 1986). The violation of the grievant's rights, however, does not necessitate the immediate posting of the positions in question and administrative notice must be taken of the disruption such a posting at the present time would cause. Pursuant to the provisions of W.Va. Code §§18A-2-6 and 18A-2-7 county boards of education are forced to make certain decisions concerning the retention and assignment of personnel for the ensuing school term within deadlines contained therein. A posting of the positions relevant to the present grievance and any subsequent reassignment of personnel which may result would be better facilitated when those decisions are made.

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

FINDINGS OF FACT

1. Grievants are school service personnel employed by the McDowell County Board of Education in various assignments and classifications in the county school system.

2. Due to budget restraints, the Board was forced to make reductions in its service employee staff and particular employees were accordingly terminated while others whose positions were to be eliminated were placed on a transfer/unassigned list in accordance with the provisions of W.Va. Code §§18A-2-6 and 18A-2-7.

3. During the summer of 1988 a number of the vacancies created by the termination of school service employees were not posted but were offered exclusively to those employees whose positions were eliminated.

CONCLUSIONS OF LAW

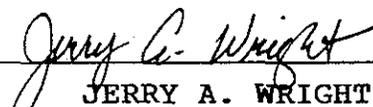
1. Pursuant to the provisions of W.Va. Code §18A-4-8b(b) a county board of education is required to post and date notices of all openings in established, existing or newly created school service employee positions for at least five (5) working days and said requirement applies to vacancies created in a reduction-in-force. Davis v. Summers County Board of Education, supra;

Murphy v. Mingo County Board of Education, supra; Peters v. Mercer County Board of Education, supra.

2. The Board's failure to post all vacancies created by the reduction-in-force of school service employees initiated during the spring of 1988 was a violation of the explicit requirements of W.Va. Code §18A-4-8b(b).

According, the grievance is **GRANTED** and the McDowell County Board of Education is hereby **ORDERED** to post any and all of the school service employee positions concerned herein at a time which is consistent with any decisions to terminate and/or transfer school service employees for the school year 1989-90 and the provisions of W.Va. Code §§18A-2-6 and 18A-2-7 but no later than June 30, 1989.

Either party may appeal this decision to the Circuit Court of McDowell 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: March 28, 1989